

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: VALSARTAN PRODUCTS
LIABILITY LITIGATION.

CIVIL ACTION NUMBER:
19-2875
ORAL ARGUMENT

Mitchell H. Cohen United States Courthouse
One John F. Gerry Plaza
Camden, New Jersey 08101
May 29, 2019

B E F O R E: **THE HONORABLE JOEL SCHNEIDER**
 UNITED STATES MAGISTRATE JUDGE

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1 (The following took place in open court)

2 THE DEPUTY COURT CLERK: All rise.

3 THE COURT: Good morning, everybody. Please be
4 seated. Sorry we don't have enough chairs, but there's some
00:18 5 chairs up here for counsel. So, come on up and have a seat.
6 These are box seats. No charge. All right. You don't have
7 to stand. Come up. Don't be shy. Come on up. I won't call
8 on you, I promise.

9 We're here on the record in Valsartan, Docket Number
00:18 10 19-2875. As a prelude, counsel, I don't know if it's good
11 news or bad news, Judge Kugler is in Washington in some
12 hermetically sealed courtroom in a code of silence saving
13 America safe for Democracy. I'm going to fly solo today.
14 I've spoken with Judge Kugler in detail about today's
00:19 15 conference. We've consulted in detail. We're in lockstep
16 about what needs to be done in whatever we're going to discuss
17 today and if we rule on things today, it's in consultation
18 with Judge Kugler, and we'll confirm all of that, of course in
19 an order to be entered after the conference.

00:19 20 If you're going the speak today, if you would just
21 announce your name for the court reporter so he can record it
22 on the transcript.

23 I intend to go through the full agenda today, and then
24 if we have time, I'd like to meet with leadership counsel in
00:19 25 the jury room afterwards to talk about some things off the

1 record. We might talk more candidly about some things and
2 answer any questions you have.

3 A good place to start is the agenda you set forth. But
4 just by way of background. Does anyone have any insight on
5 the status of FDA investigation into the contamination and
6 source of contamination? And I assume the FDA is doing some
7 sort of investigation and sooner or later some sort of report
8 is going to be prepared.

9 Does anybody have any insight on what's going on in
10 that regard? Mr. Goldberg?

11 MR. GOLDBERG: None, your Honor. At least I think
12 with respect to our client and I'm assuming the other
13 defendants is just, you know, responding to the ongoing
14 investigation.

15 THE COURT: Anyone from the plaintiffs have any
16 insight on what's go on in that regard?

17 MR. NIGH: Your Honor, at this time the FDA has
18 published contamination concentration for the concentration
19 and contamination, they published those results for what we
20 believe to be most of the pills that were contaminated in the
21 U.S. So, that's, that's come out at this point. And also my
22 understanding is that they're continuing to test Losartan
23 pills at this time and they're next turning to the next
24 Sartans. So there may be some additional recall after.

25 THE COURT: How about the status of any

1 investigations? Not just the FDA, but the other regulatory
2 bodies around the world who are looking at this.

3 Any insight over what's going on there?

4 MR. NIGH: The EMA is also very active in terms of
5 their investigation. They've also, several journalists
6 published in terms of their beliefs as to how this
7 contamination occurred for several of the active ingredients
8 manufacturers and also Health Canada has been very active in
9 their investigation. Daniel Nigh for the plaintiffs.

10 THE COURT: All right. Is there any reason we
11 shouldn't start with the agenda that counsel proposed? The
12 first issue. Streamline service protocol.

13 MR. NIGH: Your Honor, we sent the defendants a, what
14 we believe would be a good first draft in terms of streamline
15 service protocol. We had an Order in Benicar where we served
16 all of our complaints by e-mail. We're looking to do the same
17 thing. But the order also encompasses not just service of
18 complaints but service of other discovery documents as well.
19 We just did that for them on Friday though. So I believe that
20 this is an issue that would be more appropriate to discuss if
21 there's any conflicts between our sides for the next discovery
22 telephone conference.

23 MR. GOLDBERG: I think that's right, your Honor.

24 THE COURT: So you're in the confer stage?

25 MR. GOLDBERG: Yes, your Honor.

1 THE COURT: Is there anything about this case that
2 makes it different than the process we used in Benicar?

3 MR. NIGH: It does. In, in Benicar we only had two
4 defendants. So it's a little easier in terms of managing the
5 e-mail addresses. But this time we're going to be, we believe
6 that we'll be able to utilize Brown Grier, their portal system
7 to try to keep it manageable of terms of serving all the
8 various defendants in this case.

9 THE COURT: Can anyone give us a status update on the
10 service pursuant to the Hague on the foreign defendants or do
11 we have to wait until the Master Complaints are filed to get
12 to that?

13 MR. WILLIAMSON: Your Honor.

14 THE COURT: Please introduce yourself, sir.

15 MR. WILLIAMSON: George Williamson. We have
16 initiated a process service of Aurobindo through the Hague
17 through a certifying service combination. So that has been
18 underway for I'd say approximately three weeks at this point.
19 We're told that it can take anywhere between three months up
20 to six months to perfect service. So the process that's been
21 started and as much --

22 THE COURT: Which complaint are you serving?

23 MR. WILLIAMSON: This is the Holland, Jerry Holland
24 is an individual personal injury case.

25 THE COURT: Are all the foreign defendants, is

1 service pursuant to the Hague in the works for all of the
2 foreign defendants?

3 MR. WILLIAMSON: Uh --

4 THE COURT: I'm concerned because we'll get to it,
5 but, you know, there was issues, we're going to get issues
6 about core discovery and documents are overseas and, you know,
7 we got to get to that issue.

8 MR. SLATER: Judge, certain of the defendants are
9 already served in the litigation.

10 THE COURT: Right.

11 MR. SLATER: So, the DHP wouldn't have a issue with,
12 we don't have an issue with. Torrent we're good. Teva we're
13 good. So I think that would only really be Hetero, beyond
14 Aurobindo. Right?

15 MR. NIGH: That's right.

16 MR. SLATER: And Mylan. So the only two people to
17 know about are Hetero and Mylan now.

18 MS. GOLDENBERG: Marlene Goldenberg, your Honor, for
19 the plaintiffs. We initiated service of process in the Larry
20 Tack complaint. Mylan we were also told by the service
21 process agency that it could take six months to a year but
22 it's, it's going.

23 THE COURT: You represent?

24 MS. GOLDENBERG: Larry Tack.

25 THE COURT: Okay.

1 MR. STANOCH: And, your Honor, David Stanoch, Golomb
2 Honik. We had initiated service of one of our economic law
3 and class complaints on Hetero, the remaining foreign
4 defendants and it's also in process. We've been given a
5 window, roughly the same of what Mr. Williamson has said for
6 his complaint on Aurobindo.

7 THE COURT: Great. Okay. So, my notes indicate
8 there's three foreign defendants remaining to be served,
9 Aurobindo, Hetero, Mylan and service is in the works for each
10 of them. Okay.

11 So, Mr. Goldberg, in terms of a time frame, just so
12 these issues don't linger. I know we have a lot of balls in
13 the air, but when should we target finalizing the streamline
14 service for protocol?

15 MR. GOLDBERG: Well, I think we, we can endeavor to
16 try to get it done over the next few weeks that, so that when
17 we're back here or we're on the phone with you in a few weeks,
18 maybe we'll have made that progress. This doesn't seem to be
19 a very complicated issue.

20 THE COURT: Why don't we talk in a in person meeting
21 the end of June.

22 MR. GOLDBERG: Sounds good.

23 THE COURT: So that will be 30 days. So the next --
24 and that doesn't mean we can't address the issue during the
25 next phone call. Maybe there's -- when will you get back to

1 them about the comments?

2 MR. GOLDBERG: We'll get back to them by the end of
3 the week.

4 THE COURT: This week or next week?

5 MR. GOLDBERG: This week.

6 THE COURT: Okay. So that's--

7 MR. GOLDBERG: Friday the thirty-first.

8 THE COURT: Great. Okay. May 31st.

9 MR. GOLDBERG: End of this week, early next week.

10 THE COURT: Yeah. Let's just --

11 MR. GOLDBERG: We, we lost a day this week.

12 THE COURT: All right. Let's say June 5th. That's
13 next Wednesday. Okay? So June 5th defendants give their
14 comments to plaintiffs about the streamline service protocol
15 and we're going to look to finalizing it by the end of June.

16 Next issue. Master Complaints.

17 MR. HONIK: Good morning, your Honor. Ruben Honik
18 for the plaintiffs. We have been diligently at work drafting
19 the Master Complaints pursuant to the court's instructions and
20 we are poised to file by June 17th the deadline we were given.
21 In the course of that filing it occurred to a number of us,
22 particularly those of us who have been involved in Benicar
23 that this litigation would probably benefit from a similar
24 protocol that was used there, which is to say that we want to
25 share those Master Complaints with the defendants and invite

1 their comment so we can do whatever we can to reduce or
2 eliminate the need for Rule 12 Motion Practice.

00:28 3 So as you can see in our position in the submission for
4 today, we indicated exactly what I said. I think that the
5 defendants are largely amenable to that. I don't want to
6 speak for them, but they (a) want more time and (b) want to
7 ensure that they're not in any way waiving their right to seek
8 Rule 12 relief and certainly we understand that they're not
9 doing that. But that said we do think that the process should
00:29 10 be in place to allow them to comment both on the facts as well
11 as the legal allegations, if you will, so that we can do
12 whatever we can to refine the complaint and minimize or
13 eliminate motions to dismiss.

00:29 14 THE COURT: Let me make two comments and then we'll
15 hear from counsel. One is I think the defendants' concern
16 about not waiving their defenses or rights are legitimate and
17 that has to be protected, (a) if the defendants have a concern
18 that they're never going to have an opportunity to file the
19 motions that they're chomping at the bit to file, you're
00:29 20 mistaken. There's going to be a time in the case where Judge
21 Kugler decides it's appropriate for the motions to be filed,
22 but it's not now. And we want to get everything organized and
23 in place before we get to those issues. But Judge Kugler has
24 no intention of cutting off anybody's rights or defenses.
00:30 25 It's just a matter of timing.

1 So, with those general comments, what do you envision,
2 Mr. Honik, if this happens again frankly, I forgot it, but I
3 don't think it's a bad idea. What are you asking the
4 defendants to do and if you're in the defendants' shoes, if
5 they don't raise something, are you going to come back later
6 and say, well, you should have raised it earlier. We could
7 have fixed it.

8 MR. HONIK: No, absolutely not. We envision a
9 process that would in no way behove the prejudice of the
10 defendants by -- to, to raise rule, legitimate Rule 12 motions
11 to dismiss issues. And there are conceivably dispositive
12 issues that the court should entertain. And I understand
13 fully well that Judge Kugler is open to entertaining that and
14 albeit not right now. But I think it would behoove all the
15 parties and certainly the court in terms of efficiency and
16 narrowing the issues for the defendants to have a real
17 opportunity to look at the pleadings and to, I mean under the
18 Rules we would be permitted and a right to cure certain
19 deficiencies that they, you know, would bring to our attention
20 and so we want to --

21 THE COURT: We'll have to see --

22 MR. HONIK: Exactly.

23 THE COURT: So, for example, Mr. Honik, you want the
24 court to, the court's drafting an order, what should it say?
25 What should it ask the defendants to do.

00:32 1 MR. HONIK: Right. So I read their position and I
2 think they're looking to the court for some instruction that I
3 don't think is, is possible for the court to give. I think
4 the most the court can do is perhaps bless the idea of a
5 process and then put us on an appropriate time table. That's
6 how we envision it. So, for example, we have proposed that
7 the complaints rather than being filed on the docket on the
8 seventeenth, that it be transmitted to the defendants first
9 for comment. And candidly we had proposed a week out of a
00:32 10 belief, maybe mistaken belief, that they've been looking at
11 our allegations since the first of the complaints were filed
12 last summer or fall that said they suggested to us, yes, we're
13 amendable to that process, but we need more time. They
14 proposed 45 days. It strikes me certainly as too long a
00:32 15 period. And so, perhaps, something this court can do is to
16 say, you know, ten days or two weeks or whatever is sufficient
17 and essentially establish a new date by which the now reviewed
18 complaint by both sides will be filed of record.

00:33 19 THE COURT: I think timing is easy and that's not a
20 problem, but I'm just -- I don't know what to say. The
21 concept is fine, if the defendants are fine with it, I don't
22 have any problem with the concept. I just don't know how to
23 say it. By such and such date defendants will give their
24 comments on the complaint? I mean is that what you want the
00:33 25 Order to say? I don't know what the Order is going to say.

1 What do you want them to -- an Iqbal Twombly issue, a
2 preemption? I'm just -- defendants can help me? Is this a
3 new concept? Is this something invented just for this case?

00:33 4 MR. GOLDBERG: Well, your Honor, at least with
5 respect to this case, it doesn't seem like it's going to be
6 easily workable. I mean you've got 40 plus defendants. All
7 are going to have different views as to whether the claims,
8 the allegations, deficient, not deficient. We had the very
9 same reaction. Okay, what is the scope of this Order. How do
00:33 10 you define this Order. Is it we're going to correct names of
11 defendants, locations of where they operate? Some superficial
12 comments like that? Okay, maybe that's how you do it. But
13 even then, I think when you're dealing with 40 defendants,
14 some may view that kind of information as not superficial.
00:34 15 Things like preemption, fraud claims, elements of claims
16 really not an obligation of the defendants to write the
17 complaint. It's for the plaintiff. And, so, I don't think --
18 I think that's where we are really struggling with this, and
19 if your Honor can't come up with the words to fashion an
00:34 20 Order, this doesn't seem like an obligation that should be
21 imposed on the defendants.

22 THE COURT: Hypothetically let's say you filed or
23 your Master Complaint on June 17th without comments from the
24 defendants. They'll look at it and sooner or later, for
00:35 25 example, if there's a misnaming of a party or something of

1 that sort, it's going to come to our attention. We can amend
2 the complaint, right? I would envision when the time comes
3 when the defendants are going to be granted leave to file
4 their motions, I would envision, I'm not speaking for Judge
5 Kugler now, but there would be some sort of screening process,
6 okay, what are you going to file your motion on. If it's a
7 simple Iqbal Twombly come forth issue, your fourth claim
8 wasn't pleaded with enough specificity. Plaintiffs amend your
9 complaints and then they'll file their motion.

10 So, maybe we can accomplish the same goal without going
11 through this. I don't know. Seems like an awkward procedure.
12 Have you done it before?

13 MR. HONIK: Well, Judge, we are motivated to suggest
14 it because it was done in Benicar and I was apprised by those
15 a little closer to that litigation than myself, that no Rule
16 12 Motion Practice occurred in that case.

17 THE COURT: I don't think Judge Kugler ever lifted
18 the stay though. I think that's what the Rule 12 motion was
19 --

20 MR. SLATER: That's a good precedent to follow.

21 (Laughter)

22 MR. HONIK: Yeah, we're in favor of that.

23 THE COURT: But I would bet my last dollar that if
24 that Stay were lifted, there would be Rule 12 motions filed.

25 MR. HONIK: Judge, suffice it to say, if the

00:36 1 defendants think that because of the number for defendants or
2 otherwise, if they don't think this is a procedure that would
3 benefit them or us or the court, we stand poised to file this
4 on the seventeenth, and mindful of what you just said about
5 creating opportunities on the schedule to amend, to correct
6 any defendant misidentification, those sorts of things, we can
7 certainly handle it that way. We're not, we're not unduly
8 married to this idea. It's an idea that we listed, maybe
9 somewhat mistakenly from the Benicar experience, but we're
00:37 10 ready to file on the seventeenth.

11 THE COURT: Okay. Why don't we do that. Mr. Honik,
12 I would like to -- again, I'm not speaking for Judge Kugler,
13 but I would assume that, like I said, there will be some sort
14 of screening procedure before these Rule 12 motions are filed
00:37 15 so that these sort of issues can be cleaned up by simple
16 amendments will be done before they file their Rule 12 motion.
17 I mean it's silly to waste time on Iqbal Twombly motions,
18 and, of course, you're going to be granted leave to amend.
19 And then you amend, they file another motion. We want to
00:37 20 avoid that. And I'm confident that we'll do what we can to
21 address those sort of issues, cleanup issues I'll call them
22 and get to the nuts and bolts of the case, preemption, etc.
23 So let's keep June 17 as filing the Master Complaints. Okay?

24 MR. HONIK: Okay. Yes, sir.

00:38 25 THE COURT: All right. And we know that the

00:38 1 defenses, the response to the complaint are stayed. Right?
2 Short Form Complaints. Timing will be great because we'll
3 have the Master Complaints on June 17th. So we should have
4 hopefully the Short Form Complaints in due course shortly
5 after that. Right?

00:38 6 MR. NIGH: We've already drafted the Short Form
7 Complaints for the bodily injury. We're going to send our
8 proposal to that Short Form Complaint to the defendants. We
9 do think this is a little different than the Master Complaint.
10 It would be nice to have some comments from the defendants on
11 Short Form Complaints.

12 THE COURT: Yeah, I would agree with that. You'll
13 send that when?

14 MR. NIGH: Today.

00:38 15 THE COURT: Okay. So, let's put that on the agenda
16 for the phone call we're going to have in two weeks. If
17 there's any comments you have on the Short Form Complaints.
18 Am I correct that those aren't going to be filed until the
19 Master Complaints are filed?

00:39 20 MR. NIGH: Yes, your Honor.

21 THE COURT: All right. So, will there only be a
22 Short Form Complaint for the B.I. cases?

00:39 23 MR. NIGH: We're trying to look to see if it's
24 appropriate for Consumer Class. I think it will be. So
25 that's the next thing we're looking at in terms of --

1 THE COURT: How does that work? Because won't the
2 Master Complaint be a nationwide Class Action on the consumer
3 issues?

4 MR. NIGH: I believe so. But it will be -- this will
5 be in terms of who this class rep is and applying it for each
6 class rep for each State if we believe that that's appropriate
7 to do so.

8 THE COURT: All right. Let me go back because you
9 raised an issue I want to address with you. The B.I. cases.
10 There will be a Master B.I. complaint. Will that be one
11 plaintiff?

12 MR. NIGH: The Master Complaint, I don't think we'll
13 name a specific plaintiff in the bodily injury complaint.

14 THE COURT: Okay. Let's take the economic consumer.
15 That's a nationwide Class Action. Right?

16 MR. NIGH: Correct.

17 THE COURT: How do you decide who the class rep is,
18 and how many class reps will there be?

19 MR. HONIK: Your Honor, maybe I can address that. I
20 think Daniel may be confused on that. That's a separate
21 issue, respectfully. There's not going to be a Short Form
22 Complaint for the Class for the very reason I think the court
23 has beginning to see that, and that is we're going to have a
24 national class. There will be sub-classes to be sure
25 reflecting, you know, differences in the States under certain

1 legal claims that we're bridging. And what we're going to do
2 is to select class representatives that cover the waterfront;
3 that is, you know, who took the various API manufacturer's
4 pills so that we have coverage across the waterfront and all
5 the defendants. So there will be and we anticipate we're
6 screening that now. Frankly, that's the most onerous part of
7 the drafting is to identify appropriate class reps that, that
8 would, you know, fill all the spaces so-to-speak of the
9 various recall products. So there will be multiple class
10 reps. We don't anticipate a Short Form Complaint of any sort
11 because that would be subsumed by the Master Complaint.

12 THE COURT: That makes sense. So --

13 MR. HONIK: And I think what Daniel, not to interrupt
14 you, was thinking of is the differences emerging visa via the,
15 the profile forms. I think that we're going to have obviously
16 profile forms for all of the class reps in addition to
17 whatever we end up negotiating and agreeing to with the
18 defendants with the B.I. claims.

19 THE COURT: Yes, we'll get to the profile. So, will
20 be there 50 class reps?

21 MR. HONIK: No, not at all. There will be a handful.

22 THE COURT: And you'll make sure that like one, if
23 there's, picking a number out of the blue, three or four API
24 defendants, you'll make sure that they're all covered by one
25 of the named class reps?

00:42 1 MR. HONIK: Precisely. And the other criteria is
2 geographic. So we want, to the extent that we can, class
3 representatives from the various States to the extent that
4 State based sub-classes which do exist in the economic side of
5 this litigation.

6 THE COURT: You may know the law better than me on
7 this, but can you have a class rep from one State represent
8 another State? Like if it's an Illinois resident, can they be
9 a class rep for a Texas sub-class?

00:42 10 MR. HONIK: There's no simple answer to that. The
11 answer is maybe. That's -- the way I think of it is to what
12 extent can an extra territorial plaintiff outside of New
13 Jersey be covered under New Jersey law. That's an issue that
14 you'll see developed in the complaint. But there will be
00:43 15 geographic diversity, if you will, represented in our Master
16 Complaint.

17 THE COURT: Okay. And on the Medical Monitoring.
18 Oh, going back to the Economic Complaint. When I looked at
19 the class steps, there are nuances in the definition. You
00:43 20 know, consumers, companies, entities. I guess you'll work
21 that out with the actual definition of the Classes.

22 MR. HONIK: Oh, yes. I mean that in some instances
23 is our biggest single drafting challenge is to come up with
24 appropriate class definitions that encompass what we need to
00:44 25 encompass.

1 THE COURT: If you look at the Class Actions that
2 have been filed thus far, there's slight differences in some
3 of the definitions.

00:44 4 MR. HONIK: That's right. And we're drafting
5 coalescing into a comprehensive set of class definitions and
6 sub-class definitions that makes sense. We can't simply cut
7 and paste frankly what we've seen in some of the initial
8 complaints for a variety of reasons. And so, you know, we're
9 working diligently to hone it down to a sensible set of class
00:44 10 definitions.

11 THE COURT: Similar concept for the medical
12 monitoring Master Complaints?

00:44 13 MR. HONIK: Yes. Yes, indeed. There will be
14 multiple representatives that will cover geographic diversity
15 because there's a considerable variance in the law in medical
16 monitoring across the fifty States and that will be a
17 standalone complaint as well.

00:45 18 THE COURT: Terrific. Okay. So, we'll talk about
19 comments on the Short Form Complaint in two weeks and maybe
20 we'll have that finalized by the end of the month. Timing
21 works well because the Master Complaint is going to be filed
22 by the seventeenth. Any comment on the Short Form Complaints?

23 MR. GOLDBERG: No.

00:45 24 THE COURT: I think Mr. Honik does raise a good
25 point, there ought to be comments from the defendants on the

1 information you want, you being the defendants, want included
2 in the Short Form Complaint.

3 Okay. The next item on the agenda, number four.
4 Stipulation for dismissal of peripheral and minor defendants.
00:45 5 Sounds like a sticky issue.

6 MS. GOLDENBERG: Marlene Goldenberg, your Honor,
7 again. And, hopefully, we, we don't think it is. Uh, we've
8 exchanged three drafts now between the various sides. We had
9 a very productive discussion last week and think that at least
00:46 10 intellectually we're mostly on the same page. We're now
11 waiting for another draft back from the defendants, but I
12 think, I think there's a very good chance that we can resolve
13 most, if not all, of the issues. If not, then hopefully
14 that's something we can raise in a couple of weeks on the
00:46 15 discovery call.

16 THE COURT: How is the concept of tangential
17 defendants defined.

18 MS. GOLDENBERG: That's one of the issues that we
19 haven't quite gotten to yet candidly, your Honor. We again
00:46 20 have had some discussion about --

21 THE COURT: That's the ultimate issue, right?

22 MS. GOLDENBERG: It is. But the procedure is well
23 under way. We've had some discussions together about what
24 defendants view that definition as being. That's something we
00:46 25 are taking back to our side and considering, and I think that

00:47 1 on the whole we are going to hopefully on so many issues.
2 There might be a couple where maybe we don't get and we need
3 some things to play out in discovery before we make that
4 choice. But I think that so far the discussions have been
5 productive and we should be able to reach agreement on most
6 issues.

00:47 7 THE COURT: From the court's perspective, I think
8 it's important that, yes, cleanup the parties, the peripheral
9 people we don't need, but I think it's important and one of
10 the things that we'll be looking for is if we do put them on
11 the side if something comes up in the case unforeseen, and
12 they're no longer a tangential defendant, we don't want to go
13 through the whole rigamarole of filing a new complaint and
14 serving it again and tracking down people. There has to be
00:47 15 some sort of procedure that they're automatically or easily
16 brought back into the case without going through a lot of
17 administrative gymnastics.

18 MS. GOLDENBERG: Right. And that's all --

00:47 19 THE COURT: It's a tradeoff. The tradeoff is they
20 get to sit on the sidelines, but if it turns out they're a
21 player in the case, they have to come right back in the case.

22 MS. GOLDENBERG: Right.

23 THE COURT: I don't think there's an objection to
24 that from the defendants' point of view, is there?

00:48 25 MR. SMITH: No, your Honor, I don't believe so with

00:48 1 the one exception that I think the parties are probably fairly
2 well aligned as to the story here of what happened and at what
3 level it happened. It's reflection on tangential defendants.
4 We're talking about, you know, you have your API manufacturing
5 level. You have your finished dose manufacturing level. We
6 could, we could quibble about what a defendant's dose
7 manufacturing belongs in this case, but from our perspective
8 everybody below the diminished dose manufacturer along the
9 supply chain should be out of the case. You know, we don't --

00:48 10 THE COURT: Quote unquote out?

11 MR. SMITH: Out for purposes of --

12 THE COURT: Or sitting on the sidelines.

13 MR. SMITH: Sitting on the sidelines and being able
14 to take advantage of the stipulations we hope to agree with.

00:48 15 And we understand that the pass way through that, through that
16 stipulation is sit on the sidelines is some limited discovery,
17 some limited disclosure that would be made by the defendants.

18 So we think that the selection of the defendants should
19 be just below the finished dose manufacture down all the way
00:49 20 through the retailers and that would include every retailer
21 and then the disclosure should be limited to what disclosures
22 that are necessary to prosecute that case against the API
23 manufacturers. So that's what we are really looking at in
24 terms of our methodology of how we develop the stipulation.

00:49 25 THE COURT: Do you have a guesstimate of how many

1 people -- I'm sorry, companies or defendants would be left if
2 that concept comes to fruition?

3 MR. SMITH: I would, I would be guessing, your Honor.
4 But I think we would probably take the defendants' side down
5 from 50 to less than ten. I'm sorry, 42 to less than ten
6 defendants.

7 THE COURT: Mr. Honik.

8 MR. HONIK: If I may. Your Honor, the challenge with
9 that conceptually is two-fold. There are two lenses through
10 which we're examining this issue. One is legally who do we
11 need in the case, and it's our considered position that with
12 respect to the economic claims, the class claims, the consumer
13 claims, and in particular the consumer claims. The consumers
14 are in direct privity with retailers. They're the ones who
15 sold the drugs to them and without, you know, an extensive
16 primer on what that means, for example, under New Jersey law
17 arguably, and I want to argue it this morning, is strictly
18 liability for selling essentially a tainted drug or a drug
19 that's not approved by the FDA in the strictest sense of that.

20 And so the question falls to us legally can we in good
21 conscience and without committing malpractice agree at the
22 outset to let out a retailer who stands in contractual privity
23 when we got warranty claims. So --

24 THE COURT: Is there a difference between quote
25 unquote letting out stipulations of dismissal no longer

1 subject to the jurisdiction of the court or maybe severing,
2 put them on the sidelines, they don't have to participate in
3 discovery. They don't have to come to this conference and
4 when we need you, we'll call you?

00:51 5 MR. HONIK: Yeah, and that's right. So we're
6 attracted to the idea of a pause and I think that's
7 essentially, you know, what we're trying to work through.

8 The other issue, the other lens that we're seeing this
9 through is the lens of insurance solvency. We're beginning to
00:51 10 obtain insurance information which isn't exactly --

11 THE COURT: You'll get it today, won't you?

12 MR. HONIK: Well, we got some today. Apparently it
13 isn't exactly exciting us. There's a 10 million dollar policy
14 for the --

00:51 15 MR. SLATER: The three U. S. Entities subsidiaries of
16 CHT.

17 THE COURT: That's it?

18 MR. HONIK: That's right.

19 MR. SLATER: And, and I've spoken with defense
00:52 20 counsel. They sent it over yesterday and I've asked them for
21 the reservation of rights letters to see if there are any that
22 goes with the insurance companies if there's a potential
23 disclaimer of any of the policies. I think we need that as
24 well.

00:52 25 THE COURT: Of course. Any excess?

1 MR. SLATER: They told me no this morning.

2 MR. HONIK: So we're concerned about that.

3 THE COURT: By the end of the day you'll get all the
4 insurance information.

00:52 5 MR. HONIK: Presumably. So we'll continue to work on
6 it and we're certainly mindful of the fact that we can loop
7 folks back in, that we can devise a mechanism for that. So
8 we'll continue to work on it and we'll present it to the court
9 with any remaining issues at our mid month call.

00:52 10 THE COURT: Counsel, you wanted to say something?

11 MR. SMITH: I think only to say, your Honor, I think
12 you hit the nail right on the head which is we are not letting
13 these defendants out for all purposes forever with prejudice,
14 is merely ensuring that they don't have to travel here to
00:53 15 Camden every month, don't have to participate in discovery.

16 They are, they are sitting on the sidelines without pledge
17 being dismissed for purposes of and our tolling agreement
18 would reflect that as well. So that any new plaintiffs who
19 are coming in would be able to take advantage of that tolling
00:53 20 agreement and not have to sue these peripheral defendants.

21 THE COURT: Okay, I think that's a fair compromise.
22 You have to protect client's interest, but if they don't need
23 to sit through conferences like this because they're so
24 peripheral for the case, to the case, it sounds like there's
00:53 25 room to compromise.

1 MR. HONIK: Understood.

2 THE COURT: Okay. The next issue is insurance
3 information. You'll get it today. Mr. Slater, if you believe
4 there's any deficiencies, let the court know. I'm not sure
00:53 5 what the case law is, but I take the position that reservation
6 of rights letters, declination letters are clearly
7 discoverable under Rule 26H and you're entitled to them, and
8 we'll see what happens. Okay? ESI protocol.

9 MS. TOLENDANO: Thank you, your Honor.

00:54 10 THE COURT: Miss Tolendano.

11 MS. TOLENDANO: Enbar Tolendano on behalf of Torrent
12 Pharmaceuticals, Inc. LLC on behalf of the defendants. So
13 there is some self congratulatory. I want to say we had a
14 very cooperative, very productive process in hashing this out,
00:54 15 very pleasant and what we have --

16 THE COURT: I haven't heard that term used when
17 people confer with Mr. Slater yet. Now I know why you're
18 concerned.

19 MS. TOLENDANO: And we worked very hard to craft an
00:55 20 ESI protocol in very short order that's going to work for 41
21 defendants and a number of plaintiffs. Our only request of
22 the Court at this point is that plaintiffs narrow their
23 issues. The first of those issues relates to whether
24 documents submitted in connection with plaintiffs' profile
00:55 25 certify plaintiffs' fact sheet should have been at this stage

1 presumptively exempt from the ESI protocol.

2 THE COURT: This issue sort of dovetails whether
3 another issue we might as well raise at the same time.

4 Let's talk about, Judge Kugler and I spoke about this
5 issue at length. Why are we doing a profile form and a fact
6 sheet? Why is that something that both sides want or why
7 don't we just do a profile form? Why are we doing -- Miss
8 Cohen, you want to talk.

9 MS. COHEN: I'll be happy to jump up. And I'm happy
10 to report that Mr. Slater has been involved in these
11 discussions and has been relatively pleasant so far. So, we
12 --

13 MR. SLATER: I'm here to be kicked by anyone --
14 (Laughter)

15 MS. COHEN: That was a compliment. Anyway, on this
16 topic I think we've talked about this in the past. Let me
17 just add, Lori Cohen for Teva and also the defendants at
18 large. But on this, you know, we started down this path
19 because we talked about core discovery initially back in
20 March. So it started with what plaintiffs wanted from the
21 defendants, and we started grappling with this issue of core
22 discovery, knowing that you and Judge Kugler wanted to get
23 things going. You gave us that message and that we weren't
24 going to be starting immediately with 12b motions. So that's
25 why we started on core discovery which led to well, if we're

00:57 1 going to do that on the side of the defense, we need the
2 corollary to know what this litigation is about, what the
3 plaintiffs' universe is, what cases they have. Have they
4 vetted them as they told the JPML they were in the process of
5 doing. As they told your Honor at the first PMC they were
6 doing. And to basically be the counterpoint, the
7 counterbalance to the core discovery on the plaintiffs' side.
8 So we could see the cases relate to compromised of and do they
9 have proof of injury, do they have proof of, of use to the
00:57 10 core initial phase. So that's why we started this two tiered
11 process.

12 THE COURT: Why not do a profile? If we can do a
13 profile form?

14 MS. COHEN: I mean so the, the --

00:57 15 THE COURT: Or, I'm sorry. A fact sheet.

16 MS. COHEN: A fact sheet. Yes. Your Honor, I mean,
17 I mean it is true there is right now in the two-tiered process
18 the, the way it's been envisioned, we get the initial batch of
19 critical core information that we need right now to vet the
00:58 20 cases to make sure the plaintiffs know what the universe is,
21 to make sure we know what the universe is, what chances or
22 issues are. Sort of issues that came up with Judge Kugler in
23 the first conference. So it is really the corollary to this
24 core discovery. Now, if we want to abandon that on both sides
00:58 25 and move forward.

1 THE COURT: Not going to happen.

2 MS. COHEN: So, yeah, so that's, that's sort of the,
3 we think, we think it helps us to get the initial discovery
4 going.

00:58 5 THE COURT: How? Suppose we go to just fact sheets.
6 We'll have those fact sheets finalized in probably 30 to
7 45 days. What's the difference between answering one detailed
8 fact sheet and then having a profile form and a fact sheet?
9 That's what Judge Kugler and I sort of can't get our arms
00:58 10 around.

11 MS. COHEN: I understand the question and part of it
12 is something, I guess we discussed again related to the core
13 discovery aspect on both sides and then the initial phase if
14 you will? Same way on the defense side, why are we kind of
00:59 15 starting with the initial batch. We're doing it kind of a
16 phase approach so that all of these defendants can figure out
17 what is this litigation about. Because right now the
18 plaintiffs have said many times and I know the court has
19 agreed, we agreed too, it's important to know the defense
00:59 20 story. What it's about, who knew what when, what happened
21 that we come up with our core discovery. On the plaintiffs'
22 side, remember the case started back, it will be almost a
23 year. You know, the first cases were filed last summer, then
24 it progressed to JPML at the time. And although I wasn't
00:59 25 there but in the court, Mr. Nigh and others said we are

1 vetting thousands of cases. We came before your Honor. That
2 was in January and in March and we heard that many cases were
3 being vetted.

4 So at this point, it is important and helpful for us to
5 know as we look at the cases and we consider things like
6 insurance policy and the impact on everybody else and we
7 consider, you know, thinking about the cases at large and
8 where they're headed, what do the plaintiffs actually have.
9 Do they have 40 cases? Do they have 80 more coming as was

10 said? Do they have thousands? And can they be --

11 THE COURT: How are you going to find that out from
12 these profile forms?

13 MS. COHEN: Because they have been supposedly vetting
14 these cases since last summer and if they come forward and
15 they are put to the test of what they're supposed to do under
16 Rule 11 and their obligations to vet these cases before they
17 file them, it's important for us to see can they meet the
18 burden of proof, and we're not asking for them to be shut out
19 of court. We're basically saying it will be the same Benicar
20 process of giving them ample time to come back and show that

21 they have proof of use and proof of injury, you know, the same
22 kind of shared process. So if -- but if we take your
23 suggestion and obviously Judge Kugler's suggestion, you know,
24 Miss Cohen, why can't we just wait. Well then it kicks this
25 can down the road quite a bit. By the time we negotiate a

01:01 1 plaintiff fact sheet and get them to fill it out, get them to
2 provide all the details, the authorizations, the
3 verifications, it will take some time. But I think if we have
4 a commitment since we're obviously on the hook, so-to-speak,
5 to do our core discovery very quickly, it's coming up fast and
6 we've all been working diligently, but if we have their
7 commitment that, yeah, we can get this done in the next, a
8 fact sheet done in the next two weeks, and be ready to go and
9 get it done, we might be willing to agree to that. We haven't
01:01 10 started the discussion of the fact sheet among the defense
11 side. We haven't negotiated because we all were working
12 collaboratively on this counterpart of core discovery. So we
13 started on this path. We can abandon it, but I think on our
14 side, we would very much want to have a commitment that we can
01:01 15 get it done in an expedited manner.

16 THE COURT: In other MDL's, is that similar process
17 used?

01:02 18 MS. COHEN: I think the profile forms are the new
19 MDL, you know, issue de jour, if you will. I've seen it more
20 in more recent ones. And I know when you go to like the Emery
21 Conference and the Duke Conference and the legal discussions
22 about this issue, using the profile forms as an early vetting
23 process. Because both of the plaintiffs and defense, it's
24 hard to benefit one side or the other. But to know what is
01:02 25 before this court, what is this universe going to look like.

01:02 1 And so I think more MDL's are using this now as an initial
2 method to basically get at what the case is going to be. Even
3 to make sure that we're weeding out any cases that don't
4 belong and know that that's a common shared concern of both
5 sides. That this litigation will not get bogged down with the
6 tangential defendants but also cases that are -- do not merit
7 the caliber of the leadership here on the plaintiffs' side as
8 well.

01:02 9 THE COURT: You used the term weeded out cases.

10 Okay.

11 MS. COHEN: Uh-huh.

01:03 12 THE COURT: It hasn't been mentioned yet that there's
13 not going to be a quote unquote lone pine order in this case.
14 The only way you're going to quote unquote weed out cases is
15 if a plaintiff doesn't answer the profile form. Is that what
16 you're talking about?

17 MS. COHEN: Yes, your Honor, that's exactly right.

01:03 18 And what we had envisioned we basically looked at the Benicar
19 process and the Orders albeit not in the, exactly the same
20 format, the profile form, but kind of narrowing, you know,
21 again a new age, a new age here to when that started because
22 these profile forms are again coming about more often in MDL's
23 where we're seeing them more. But again we're not asking the
24 court to just kick them out of court without appropriate Show
01:03 25 Cause, you know, opportunities and under the structure we've

01:03 1 discussed, we included in the draft forms. I think we have at
2 least three different, you know, opportunities to come back.
3 So we think it's fair on both sides. And when I do talk about
4 weeding, again it's not to shortchange anyone with due process
5 on either side, but a method of figuring out, you know, the
6 cases that belong here, do they meet the standards of filing
7 and do they meet the Show Cause requirements. So that's what,
8 that's what is being envisioned.

01:04 9 THE COURT: So the profile forms, being this show
10 cause procedure and then when we get to the fact sheet, we're
11 going to do it again.

01:04 12 MS. COHEN: That's right, your Honor. And I view
13 that not as a duplication, but as very similar to, you know,
14 what's being imposed here, and again agreed to and worked on
01:04 15 very collaboratively by all sides here on the defense side.
16 Having both an initial phase, core set of information, so both
17 sides and the court really knows what's here. You know, what
18 kind of cancer do we have or do they have the right
19 authorization. Do they have the proof that they need and then
01:04 20 come later, we would get into the process of the fact sheet.
21 But, you know if you and Judge Kugler think that we should
22 abandon this initial phase on the plaintiffs' side, I think
23 what we would say on the defense side, and again we haven't
24 even begun the process of looking at a draft. I think we
01:05 25 would want it to expedited. And, again, the same three really

1 significant principles that we've asked the court to consider
2 regarding profile forms that is verification, authorization
3 and also a Show Cause process, and we would want that. But
4 the fact sheet, of course, would be much more complicated.

01:05 5 So, again, the profile forms are meant to be limited and meant
6 to be very concise and meant to cover only certain issues. If
7 we abandon this and move for a fact sheet and, you know, other
8 fact sheets and what they entail, it would be broadening the
9 scope in a major way, that we could roll up our sleeves and
01:05 10 work on that quickly. But I think the idea of pushing that
11 down the road a couple months really kind of gives the
12 advantage then for plaintiffs to know a lot about the defense
13 side without us knowing that on the side of the plaintiffs.

01:05 14 THE COURT: This is certainly an issue that I have to
15 talk to Judge Kugler about because we're sort of up in the air
16 about it. But I can tell you this, as to the three issues you
17 mentioned. One, it's going to be quote unquote verified.

18 MS. COHEN: Yes, your Honor.

01:06 19 THE COURT: I don't know why you can't use a
20 declaration under 28-17-46. Two, every plaintiff is going to
21 fill out a fact sheet and/or profile form, not just class
22 reps. On the authorization issue we'll talk about it, but I
23 don't know why a plaintiff wouldn't sign an authorization if
24 it's appropriately worded. I don't know. Does that make a
01:06 25 difference in whether we're going to go with a fact sheet or

1 profile form?

2 MS. COHEN: Again, that's -- I do want to make -- I
3 don't think it would be the defense that files that profile
4 form initial. I think the, you know, a grant joint
5 discussion. So then it's really a timing issue. We could get
6 a fact sheet, a full fact sheet hammered out, negotiate and
7 discuss and be quick timing, I think we would all be fine with
8 that. It's just going to be a lot broader than the plaintiffs
9 are envisioning in their profile form. And, again, you know,
10 I don't want to offend the Court but this whole process MDL is
11 for efficiency and judicial economy and certainly this is a
12 means of avoiding all whatever it is 42, what the current
13 number is, defendants serving discovery to the plaintiffs. So
14 this is a means of really making easier on them not more
15 challenging. I do appreciate the concern about duplication
16 and as long as we can get this done fast, I think we would be
17 okay with a full fledged fact sheet with all the bells and
18 whistles. They can move quickly on that.

19 MR. SLATER: Thank you, your Honor. Just to start
20 off and knock one issue off, as your Honor recommended.
21 Whatever process we filed, it's not going to tell the defense
22 one thing about how many cases are ultimately going to be
23 filed. I mean whether somebody fills out a fact sheet or a
24 profile form doesn't tell you if there's another three cases
25 get ready to be filed or three thousand. So that's, that's

01:08 1 going to give no information. Historically what happens here
2 is this. We propose to them the use of a simple profile form
3 in short order. Products used. Product I.d. if it's a B.I.
4 case. What is the cancer that's being claimed. That's it, so
5 we can get a very quick snapshot of what the litigation looks
6 like.

7 THE COURT: And is that all information all in the
8 complaint? The cancer --

9 MR. SLATER: Not necessarily the type of cancer.

01:08 10 And, and not somebody verifying the products used and
11 potentially providing records, you know, pharmacy records on
12 that. I mean we basically said we're going to give you the
13 core and I know it would helpful too to have that core
14 information as the defendants' side as well. We want it
01:08 15 verified and we want medical information from all medical
16 providers, and the conversation so we can move forward.

17 So what we ultimately came up to and where we are
18 today, we propose a robust profile form where the plaintiff is
19 going to give the product I.D., the product use information
01:08 20 but also, for example, in the bodily injury cases, who were
21 the proscribing physicians. Who are the diagnosing
22 physicians. Who are the treating physicians or providers and
23 you get the med -- and provide authorization for each of those
24 providers which would basically give the defense a full
01:09 25 picture of that person's medical history because you're going

01:09

1 to be going to get treated for cancer. You're going to talk
2 about your past medical history and surgical history. The
3 prescribing doctors are going to have most of their medical
4 condition, if not all. I would say all of the medical
5 conditions. They medications, everything that matters will be
6 in those medical records for 99.5 percent of the plaintiffs.
7 I guess something could straggle out but normally you're going
8 to a doctor or provider to be treated for cancer. You're
9 going to tell them and, and, and the history is going to be
10 very thorough. The pharmacy records. Health insurance
11 records we discussed.

01:09

12 THE COURT: What about the issue of whether we're
13 going to go with fact sheet and the profile form or just the
14 fact sheet.

01:09

15 MR. SLATER: I'm getting to that. I'm trying to
16 develop some logical foundation first.

17 THE COURT: I was wondering when you would get to the
18 point.

01:10

19 MR. SLATER: So anyway. So, basically, what
20 happened, we said we want verification. Want authorizations.
21 We'll give you more information, but the tradeoff is. Let's
22 do a fact sheet for plaintiffs who are chosen for bell weather
23 discovery because they're more broad, they're more detailed.
24 And frankly you do them across the board. It creates enormous
25 amounts of work for the lawyer on both sides. It creates a

01:10

1 lot of expense for lawyers on both sides, ordering, you know,
2 the defense is going to want every doctor the person's ever
3 been to, every employer they've ever worked at, et cetera.
4 And for most of the plaintiffs, the case is never going to get
5 worked up into a bell weather process. So what we said let's
6 give you the core information that you need to understand the
7 cases and it's not a limited core information. We're talking
8 about access to of the medical records that are relevant, full
9 product I.D. and full products used records. You know what we
10 need to see. What is this case really about, a very broad
11 brush. It's not a limited disclosure that we've offered in
12 the back and forth. But again plaintiff fact sheets, they're
13 going to want everything, every single chemical you were ever
14 exposed to. Did your mother smoke. I mean it's going to be,
15 it's going to be everything under the sun. So we put every
16 plaintiff through litigation, through that process as opposed
17 to those that get ultimately chosen for bell weather
18 discovery, where, okay we have to scrutinize these cases
19 because they're potential trial cases. And the final thing
20 is, the Order to Show Cause Process, we have no problem with
21 implementing that on the profile forms if they're framed in
22 the way we proposed and if the plaintiffs' fact sheets are
23 limited to the plaintiffs who are actually selected for a bell
24 weather workup because again you shouldn't go through that
25 twice. It should be a one time for the main information be

01:12 1 produced for most of the plaintiffs and we think that's a
2 reasonable compromise between the defendants who want a lot
3 more information already. The plaintiffs who don't have to do
4 this twice and to try to balance out not only the efficiency
5 but the cost and the work so we can focus on things that
6 really matter and there will be plenty of information for each
7 plaintiff through the profile forms that we're proposing.

01:12 8 THE COURT: Miss Cohen, let me ask you this question.
9 This is -- it's not going to be decided today. I have to
10 consult with Judge Kugler and he'll make the final decision.

01:12 11 Here's your choice. One profile form, but the fact
12 sheets are only filled out by quote unquote 9/11 plaintiffs
13 which are going to be a while before they're identified,
14 that's for sure. On the other side fact sheets for all
15 plaintiffs. Well, if you had a choice, which one would you
16 choose.

01:12 17 MS. COHEN: If I had a choice, again I haven't had a
18 chance to consult with the Master, but I think I'm being
19 called on, but I would say to full fact sheets with everything
01:12 20 for everyone because I think that's appropriate, especially
21 with this litigation. And again not to be, you know, not to
22 respond to every point, but robust is truly in the eye of the
23 beholder because the profile forms are not robust and give us
24 only limited information about proscribing a cancer treatment
01:13 25 and there's a whole world of information that will not be

1 captured in profile forms. So I think they don't give us what
2 we need. So I think if the court is leaning towards just one,
3 we should have full truly robust fact sheets with all the
4 bells and whistles that are appropriate.

01:13 5 THE COURT: Okay. I'm going to consult with Judge
6 Kugler. He'll make the call and we'll put it in an Order. I,
7 if I had to, I had to guess and I'm just guessing, I think
8 we're going to go with one fact sheet. So, why don't you
9 start drafting a fact sheet. It's not like this has never
01:13 10 been done before. I pulled out a copy of the Benicar fact
11 sheets. It was -- I'm surprised it was so long. It was 38
12 pages and I'm looking at it now.

13 MS. COHEN: Okay.

01:14 14 THE COURT: It was a declaration under 28-17-46,
15 makes perfect sense obviously. And the Order to Show Cause
16 procedure. I don't know why you wouldn't just follow what we
17 did in Benicar. It worked beautifully. I'll give you the
18 citations. The Orders, I noted it down. I know it's a lot of
19 work for the plaintiffs, but, you know, I pulled out Judge
01:14 20 Kugler's comment from July 28, 2015 conference we had in
21 Benicar. If somebody wants to bring 400 lawsuits, then they
22 ought to have the staff to do it right. We're going to be
23 here years, but we're not going to do it. If you want to file
24 200 lawsuits or 400 lawsuits, God bless you. And, you know,
01:15 25 six years from now your pay day is going to be great. Spend

1 the money now to get these things done and --

2 MS. COHEN: Judge, we'll work on that. We'll start
3 our draft right away.

4 THE COURT: Okay. And we'll, from the Court's
5 perspective, we'll work with you to get it done as soon as
6 possible. And let's target finalizing it in 30 days.

7 MS. COHEN: Thank you, your Honor.

8 THE COURT: And then we'll decide whether they have
9 to be answered within 60 or 90 days. I'm not sure which one
10 we did. Well, I'm sorry to take the wind out of your sail.
11 The issues that are in dispute, every plaintiff is going to do
12 a fact sheet. There's going to be Declarations. Is there a
13 dispute about whether records authorizations have to be
14 signed? Mr. Slater?

15 MR. SLATER: The, the question was whether or not the
16 profile forms were going to be ultra simplistic.

17 THE COURT: Oh, okay.

18 MS. SLATER: Or more searching if we were going to
19 provide all of that information that I recited, then we have
20 no providing authorizations for those physicians that were
21 identified.

22 THE COURT: Let's assume we're going to go with the
23 detail fact sheets. So, I assume we don't have an issue with
24 the records authorization.

25 MR. SLATER: I don't think we have an issue. I

1 think, I think 30 days may be aggressive on getting the
2 negotiation done over the content of the fact sheet. We can
3 try but --

4 THE COURT: Okay, let's try. It's not etched in
5 stone.

6 MR. SLATER: Yeah. But one of the issues that's
7 going to come up is, you know, when you asked about medical
8 authorization, there's no harm in previewing. We talked about
9 every doctor that every person ever been to for every single
10 medical condition they've had. That's going to be part of the
11 discussion. Obviously medical authorizations should be signed
12 for any physician that falls within the scope of what's
13 ordered, but that's going to be a question we're going to have
14 to talk about.

15 THE COURT: Okay, we'll deal with it. We'll deal
16 with that. We'll target 30 days. Again it's not etched in
17 stone. If you can't get it done, we'll deal with it. But
18 that is one of the issues as opposed to some of the other
19 issues we're dealing with. That should be on the front burner
20 rather than the back burner. Miss Cohen.

21 MS. COHEN: Yes.

22 THE COURT: We want to get that entered like you do
23 promptly. That's a front burner issue. So we'll give that
24 priority.

25 MS. COHEN: Yes, your Honor, we'll get working on

1 that.

2 MS. TOLENDANO: I think the issue with respect to the
3 ESI protocol and how it relates to the plaintiffs' fact sheets
4 is there will certainly be a production of the documents that
5 are accompanying those fact sheets when they're submitted. I
6 think what this exchange illustrates is the fact that the
7 scope of those documents are still entirely hypothetical at
8 this point. And so --

9 THE COURT: You know it's going to be a lot.

10 MS. TOLENDANO: I agree. And so you have to that
11 extent, and, and I like your Honor's quote about having the
12 staff to do it right. Defendants, the full perspective is
13 that the protocol that we've spent the last three weeks
14 negotiating should presumptively apply to the fact sheets.
15 Uh, we are willing to put off that discussion because, uh, you
16 know --

17 THE COURT: They don't know what the dispute is.

18 MS. TOLENDANO: The dispute is whether documents that
19 are produced in connection with plaintiffs' fact sheets are
20 documents produced by the plaintiffs themselves should be
21 subject to the terms of the ESI protocol.

22 THE COURT: So, what's the dispute? Why, why don't
23 you want it subject to the protocol?

24 MR. PEROCKI: Your Honor, Gary Perocki on behalf of
25 plaintiff. Your Honor, the main reason why there's a dispute

01:18 1 in terms of whether or not these documents are subject to the
2 ESI protocol is that for any one particular individual
3 plaintiff, we're talking about a finite number of documents.
4 It's usually, you know, may be a couple thousand pages at most
5 of medical records and the way that they're usually processed
6 is those medical records come in either paper or scanned.
7 Right? They're not electronic documents, and the way the
8 procedure works is you submit your completed plaintiff fact
9 sheet and you upload as attachments to that plaintiff fact
01:19 10 sheet your medical records, your authorizations and then that
11 gets submitted as a packet essentially to the defendants. If
12 we were then to subject that to the ESI protocol, each one of
13 those plaintiffs would, in addition to having to do it that
14 way, somehow come up with a method for bates numbering these
01:19 15 documents across all plaintiffs or assigning them in the, you
16 know, individual bates numbers, then putting them through a
17 review process which we normally don't do. We, we take the
18 records and we just produce them.

01:19 19 THE COURT: What did you do in Benicar?

01:19 20 MR. PEROCKI: We did it the way I'm talking about
21 right now, which is what we did was we didn't have those
22 records subject to the ESI protocol. Those records were
23 submitted in conjunction with each plaintiff fact sheet and
24 sent as a complete packet per plaintiff.

01:20 25 THE COURT: Were there any problems in that?

1 MR. PEROCKI: No, there weren't which is why we
2 wanted to event that from the ESI protocol.

3 THE COURT: And what advantage would we get to your
4 proposal.

01:20 5 MS. TOLENDANO: So in effect our proposal is just
6 that we will discuss at an appropriate time when we've
7 actually hashed out what information will be included. You
8 know, we were, we were reasonable when it came to the
9 documents that we produced with the plaintiff profile forms
01:20 10 because we had an understanding that that universe of
11 documents would look like, and in this case, you know, like my
12 colleague said, we're talking about potentially thousands of
13 pages or thousands of documents per plaintiff. I certainly
14 understand and am sensitive to the concerns on behalf of each
01:20 15 of those plaintiffs, but, one, they are presumably represented
16 by counsel and, two, if you multiply out those thousands of
17 pages times potentially hundreds or thousands of plaintiffs,
18 and multiply again by each of 41 defendants who are going to
19 have to process, you know, all of these documents and find
01:20 20 some way to then artificially, you know, go through the, the
21 back-end of bate stamping and organizing them in a way that
22 works, it's actually potentially a considerable burden.

23 THE COURT: Why don't we do this. We have 2200, 2100
24 plaintiffs in Benicar, we had no problems. The default
01:21 25 procedure will be the Benicar procedure, but if you -- if

1 things develop and for good cause, if you want to revisit this
2 issue, make an application.

3 MS. TOLENDANO: Thank you, your Honor.

4 THE COURT: Okay?

5 MS. TOLENDANO: Thank you, your Honor.

6 THE COURT: The second issue is the Categorical
7 Privilege Logs. I think this is a legitimate concern on both
8 sides. I just wonder if we have to wait and see. This is an
9 issue. I just wonder if we have to wait to see what we have.

10 MR. SLATER: I would just say, your Honor, we have a,
11 we have a serious issue with Categorical privilege --

12 THE COURT: I'm not deciding it now. I understand.
13 Hypothetically one defendant says to the court we have 40
14 thousand documents, Judge, that fit into this one category.
15 Wouldn't it make sense, you know, they make a representation
16 about blah, blah, we prove it, we justify it, corroborate it.
17 Doesn't it make sense to deal with that on a categorical basis
18 than 40 thousand -- I just had a case with a thousand page
19 privilege log. Isn't that ridiculous?

20 MR. SLATER: Yeah, it is ridiculous to, to claim that
21 that that document's a privilege. But I think the answer
22 respectfully, your Honor, is that the Categorical privilege
23 designation should never be permitted and I'll tell you why.
24 It makes it much easier for the defense to sweep thousands of
25 documents into a Privilege Log if all they have to say is, you

01:23 1 know, attorney/client privilege with some boiler plate
2 description which in this District, in this Circuit that's not
3 enough. If they're going to claim that we're not going to see
4 a document or a portion of the document, the defense needs to
5 actually give us information about that document that we can
6 scrutinize that document and determine whether that document
7 actually qualifies for the privilege. So we want to make it
8 as hard as possible and there's nothing secret about that and
9 I think frankly the law wants to make it as hard as possible
01:23 10 to shield any document under privilege. That's what the law
11 says. It's frowned upon. So, a Categorical Privilege
12 designation makes it much easier to sweep this in. They
13 should have to go document by document and sign off and say
14 this document was privileged for this reason. It was between
01:23 15 these people. It's on this general subject and this is why
16 you're not getting it and they should have to go to the next
17 document. And if they have 40 thousand documents, that's, you
18 know, that's, you know, that's, that's what they have to
19 choose to do.

01:23 20 THE COURT: I think you may be conflating issue two
21 with issue three. We're going to get to issue three. But on
22 issue two, the Court's direction is it's not ruling whether or
23 not it is or is not permitted. The burden would be on the
24 defendant to Show Good Cause why they should group categories
01:24 25 of documents. If there's good cause, it will be granted. But

1 we're not going -- you're not going to preauthorize it without
2 a Good Cause finding. Okay, that's the issue two.

3 Issue three I think is the issue you're most concerned
4 with Mr. Slater and I agree with you because there has never
5 been an instance in the thirteen years this court has been on
6 the bench that it has not personally reviewed documents in
7 camera. Every week I review in camera documents by inhouse
8 counsel. And you could read legions of my opinions about the
9 two roles inhouse counsel plays, business and legal and there

10 is not going to be a blanket privileged designation for
11 anything prepared by inhouse counsel, because we know that
12 inhouse counsel sometimes can play the business role. That I
13 think is your major concern. I don't know how to deal with
14 this issue about, you know, how do we limit the logging, but I
15 mean clearly, well, I don't to say clearly but I would think
16 correspondence between inhouse counsel and outside counsel is
17 privileged. I would think correspondence from outside counsel
18 is privileged. From there I'm not sure.

19 MR. SLATER: If I can short circuit this. In looking
20 at -- I was, I was involved to somewhat in this, that's why --
21 but not heavily involved which is why we got along so well as
22 you've heard. I think ultimately looking at this, if a
23 document gets turned up through our search terms, then it's
24 come out of someone's custodial production and it should be
25 produced or they need to log it as a privileged document. I

01:26 1 don't think that we really should have presumptive, uh,
2 categories where they don't have to list on the log that they
3 held the document back. I think that the best thing to do is
4 just have a default where, hey, if something pops out of the
5 research and development person's documents when their
6 custodial production is done and if there's lawyers on it, so
7 they're going to log it. I mean if we get to the point where
8 we have a custodial production from someone in the legal
9 department, we can revisit. But we're not talking about
01:26 10 lawyers having their documents searched here. So I think
11 everything should be listed.

12 MS. TOLENDANO: Your Honor, may I be heard briefly?

13 THE COURT: Yes.

01:26 14 MS. TOLENDANO: A few preliminary indications. I
15 think the way the plaintiffs conceived of this provision. The
16 first I'd like to know that we're not limiting the two
17 provisions, solely documents related to, solely to the defense
18 of the litigation and then they proposed and also between
19 outside counsel and in-house counsel. And so the universe of
01:26 20 documents that we're talking about, necessarily, are all
21 documents that are dated after the start of the litigation and
22 that relates solely to the defense of the litigation. But if
23 --

01:27 24 THE COURT: That's a very, very, very sticky subject
25 because hypothetically, someone in the RND Department tomorrow

1 starts investigating the cause of the contamination that
2 they've discovered in 2018. Okay? Someone can say that's
3 solely to the defense of the lawsuit. Right?

4 MS. TOLENDANO: Work product.

5 THE COURT: They may not. Well, it is work product.

6 MS. TOLENDANO: If in that scenario from someone
7 who's directly biased, done at the direction of the attorneys,
8 I think part of the issue --

9 THE COURT: What if the FDA -- what if the -- okay,
10 the FDA says to the defendants, what's your opinion on what
11 caused the contamination. In-house counsel calls RND and says
12 I want you to investigate that. Is that privileged? Is that
13 work product?

14 MS. TOLENDANO: I understand the concern. I just
15 want to --

16 THE COURT: That's why it's so hard to put a blanket
17 --

18 MS. TOLENDANO: But I do think it illustrates what
19 will happen if we find that we can't determine which is that I
20 could leave this conference today, I could a summary e-mail to
21 the Deputy Chief --

22 THE COURT: No, no, no. That's privilege.

23 MS. TOLENDANO: Until he forwards it to the G.C. and
24 at that point, we're now talking about something that I
25 created and that it's going to be forwarded from an in-house

01:28 1 person to a non-lawyer. And so the issue with the way it's
2 being conceived right now and I understand that we may need to
3 find some other middle ground, is that if we're conceiving of
4 privileged communications with those that don't need to be
5 logged and being defined only as between lawyers, we run into
6 a real problem.

01:28 7 THE COURT: No, no. I agree with you there. No, no,
8 no. You could read my opinions. No. Privilege -- you can
9 have a communication between a company and a lawyer. Company
10 employer is privileged. There's dispute about that. The
11 problem is we're just dealing with the issue of what has to go
12 on the log.

01:29 13 MS. TOLENDANO: I understand that. I think there's
14 also a related issue as to logging these communications. So
15 if I reach out to the CEO on a Tuesday and I log this
16 communication, then I have to log it CEO created work product
17 on Wednesday, and now the custodian says, suddenly the
18 privilege log itself is starting to infringe on the concept
19 privilege.

01:29 20 THE COURT: So you send to it the CEO.

01:29 21 MS. TOLENDANO: I have to say I e-mailed the CEO
22 on Tuesday, Wednesday the CEO created a document that we are
23 also withholding because it's now work product. And so these
24 communications, this is something that can happen on a rolling
25 basis, and it's obviously limited, not to just to those sort

1 of sensitive documents, but also scheduling depositions.

2 THE COURT: But isn't that sort of like that you
3 would e-mail it to some in-house person -- counsel, not just
4 the CEO. Now that's privileged. Right? That's categorically
5 privilege. Outside counsel to inside counsel.

6 MS. TOLENDANO: I think if we were turned out to do
7 what's best, that's what we'd have to do. I think every
8 communication would need to be routed through inhouse counsel.

9 MR. SLATER: And, your Honor, this is why where we
10 come out at this point is, there can't be a categorical
11 exclusion. If something gets picked up in the searches and
12 counsel says it's privileged, it should -- we can't draw a
13 bright line. We can't be sure and it's just a safer way to
14 go, and I think he's concerned about having, you know,
15 privilege does not exist in every case. These privileges were
16 created. So that's not an issue. And ultimately, again,
17 we're going to be searching custodial files of particular
18 individuals. So, if a document pops up and somebody is in
19 marketing or in research and development whatever it is, it
20 should be logged if they're claiming it's privileged. And if
21 it's the back-end of the chain of e-mails that started with a
22 lawyer, they can, you know, they can redact portions and not
23 redact other portions and identify the redaction on the log
24 until agreed. And that's it. I mean that way everybody is on
25 the same footing and everybody knows what was there. I think

1 that's the only way reasonably to approach it.

2 THE COURT: We're talking about custodial files of
3 non-in-house counsel or outside counsel. Right?

4 MR. SLATER: Yes.

01:31 5 THE COURT: Okay. So I think that the default
6 setting should be everything has to be logged, but, again, for
7 good cause, if you find, any defendant finds that it's unduly
8 burdensome, disproportional, make an application and the court
9 will consider it. I'd like to have a concrete situation in

01:31 10 front of the court rather than a blanket authorization. I
11 don't think that prejudices the defendants because if there's
12 good cause, you're going to get what you want. But there is a
13 concern because it happens in every case. The communications
14 in-house and what's privileged and what's work product and
01:32 15 what's predominantly legal and what's predominantly business,
16 you know, the issues aren't easy, but I think that's the
17 fairest thing to both sides. Okay?

18 MS. TOLENDANO: Thank you, your Honor.

01:32 19 THE COURT: So I think you can go back to your client
20 and say if there's a good reason why we need to do it by
21 category, they're going to get it. But just make an
22 application for it. Okay?

01:32 23 And then the last issue is other products. I didn't
24 understand that frankly. And is another Sartan in other
25 products?

1 MS. TOLENDANO: We haven't discussed that. I think
2 at this point what we mean by other products is products that
3 as of this point we don't anticipate even becoming part of the
4 litigation.

01:32 5 So to give you background on where this stipulation
6 comes from. There are going to be scenarios from our
7 experience where, for example, defendants are internally
8 discussing sales data. And what I mean an e-mail --

01:33 9 THE COURT: Excuse me. You're a hundred percent
10 right on that one.

11 MS. TOLENDANO: Delightful.

12 THE COURT: Right? You can't disagree with that.

13 MR. PEROCKI: I think the issue is do we get to know
14 -- I mean this is the --

01:33 15 THE COURT: Sometimes. But this goes back to, you
16 know, the blanket rules sort of situation. Okay, great. That
17 document that contains five hundred different products, okay,
18 if you don't log that one, what about the ones that only
19 contain three products, do you have to log that one? And
01:33 20 that's where the issue comes in, is what they want to say is,
21 look, anytime that we are withholding a document that contains
22 what we consider a non-relevant product, we don't have to tell
23 you what that product was. We're redacting this document,
24 we're withholding that document and how they define
01:33 25 non-relevant product is the, you know, the issue. So, we, we

1 don't know what that non-relevant product is. How do we get
2 to figure out whether or not we think that document is
3 relevant, even if they don't.

4 MS. TOLENDANO: The name of the product ultimately
5 is, is not relevant to this consideration.

6 THE COURT: Doesn't it go both ways? You have to
7 trust the defendants that they're complying with their
8 professional responsibilities and obligations to produce
9 relevant information. They have to rely on the plaintiffs
10 that the plaintiffs are producing, fulfilling their
11 professional responsibilities. So if the defendant makes a
12 representation that this is an irrelevant product, has nothing
13 to do with case, it fits into the category and it's not
14 another Sartan, why can't we rely on this just like they rely
15 on your representation that certain OBGYN documents medical
16 records you're not producing because they're not relevant to
17 the case.

18 MR. PEROCKI: I think the issue is you can rely on
19 the defendants to make some determination but just with the
20 privilege log, we have to have information that allows us to
21 cross check.

22 THE COURT: I think the way I'll deal with that one
23 is, I'm with the defendants on this one. You're going to get
24 redacted documents. Right? You're going to get a 25 page
25 sales report and there will be redactions all over the place.

1 If you think there's important information that's redacted
2 that you need to see, ask the court to look at it in camera.

01:35 3 MR. PEROCKI: What about withheld documents that are
4 completely withheld? So if you have an e-mail with three
5 attachments and they withhold one entire attachment and say
6 look that attachment that has nothing to do with -- you know
7 with, has to do with an irrelevant product.

01:35 8 THE COURT: But don't we have to trust them? Don't
9 we have to trust them just like they trust the plaintiffs, you
10 have to trust them.

11 MR. PEROCKI: But we're talking about attachments to
12 a document that is relevant. Right.

13 THE COURT: Right.

01:36 14 MR. PEROCKI: As a, as a, as a primary point that
15 entire family of documents, the e-mail and the three
16 attachments, since the e-mail is relevant, and two of the
17 attachments are relevant, we're getting an incomplete document
18 but we don't know what we're missing.

01:36 19 THE COURT: If you think you need it, ask the court
20 to look it in camera.

21 MR. PEROCKI: Okay.

22 MR. SLATER: I just have one question because you
23 raised the question with that other Sartan and then all of a
24 sudden it became a sticky conversation.

01:36 25 THE COURT: No, no. That's relevant to the case.

1 MR. SLATER: I get it.

2 THE COURT: I think other Sartans are relevant to the
3 case.

4 MR. SLATER: I get it, but the defendants in their
5 good faith analysis to the case, I'm not being factitious and
6 they say, well, no, it's not. That's not subject to a recall.

7 THE COURT: Here's the portion that's not.

8 MR. SLATER: And then the other question, Judge,
9 there may be other products that aren't Sartans where there
10 may have been a contamination issue for a short period. Who
11 knows. And they say, well, no it's not, it's not one of these
12 drugs, so it's not relevant, we don't have to tell you.

13 That's why there's no not trusting by saying look if you're
14 going to redact information on other products, just literally
15 just tell us what those other products are.

16 THE COURT: No. This is the example I was thinking
17 of. I don't know what the facts are in this case. I have no
18 idea, but let's just say the same factory made ten different,
19 same assembly line made ten different products. One of the
20 products was Valsartan contaminated, clearly relevant. Same
21 assembly had contamination for a quote unquote other products.
22 I would think that that's relevant to the case because they're
23 the same cause. Right? If you find that out, just make an
24 application for it.

25 MR. SLATER: We'll never know. We'll never know

1 because they're not telling us which products they redacted.

2 So we have no idea --

3 THE COURT: You'll know because when you do your
4 discovery of their 438 inspection report, you'll get that
5 information. When you ask for their quality control reports
6 and et cetera, you'll get all that information.

7 MR. SLATER: Not to push back too much, but they're
8 going to say we're not giving you those reports on products
9 that aren't in this litigation. So we're not -- I mean
10 there's going to be and I think they probably would agree with
11 us, they don't plan to provide us inspection reports on
12 products that aren't in this litigation. I think you're going
13 to find if you probe the defense a little, you're going to see
14 that it's -- you know, it's going to be sticky.

15 THE COURT: I don't expect to have inspection reports
16 for a particular product for plans, but if you see a redaction
17 on page four and they redacted this and they say it's because
18 it's another product but it was the same assembly line, you're
19 going to get it. You're going to get it. But I think that to
20 say that they have to identify every non-relevant product in
21 the case is not appropriate. The burden should be on, in this
22 instance the burden is on the plaintiff to make an
23 application. But let's talk about that. Is other Sartan
24 relevant product.

25 MR. SMITH: Your Honor, if I may. I think we're

1 putting the cart before the horse on that issue. And here's
2 why I say that. We will get document requests from the
3 plaintiffs. When we get those document requests, they will
4 undoubtedly ask for other products that they think are
5 relevant and that time before we start producing documents, we
6 will come to the Court with our view of what's relevant and
7 what the scope of those documents request should be and then
8 the Judge, or your Honor, will make rulings and we will follow
9 those rulings and then we will redact other products that your
10 Honor and the parties have decided are not relevant to this
11 litigation, following that discovery motion practice. And
12 that's when we will not be required to list all of the other
13 products that we are redacting. So in a situation where we
14 have a spread sheet that has 500 different products, we're not
15 going to have to list all 500 of those products as the reason
16 we're redacting. But I would suggest in the context of the
17 production, in the context of a family of production that the
18 plaintiffs are receiving, they will have an understanding of
19 what that document was. They will not know the name of the
20 product that was redacted. But I would submit it doesn't
21 matter whether the name of the product is, is a particular
22 product name or product A, B, C. They will know from the
23 context of the document surrounding it in that family as to
24 whether they want to make an application to the court to say I
25 think I need to see this document. And for your Honor to be

01:40 1 able to see that in camera. So I think talking about whether
2 we're going to produce this document or that document right
3 now is putting the cart before the horse because we haven't
4 seen the request. We haven't had the opportunity to evaluate
5 them and submit to your Honor our views to have relevance.

6 THE COURT: Well, we might get into this issue when
7 the defendants have to produce the core discovery.

01:41 8 MR. SMITH: And I think your Honor has dealt with
9 that in the core discovery order and we are diligently trying
10 to produce those documents, and when we get those documents,
11 there may very well be discussions between the plaintiffs and
12 defendants on this, the scope of the production we've made.
13 But, again, I don't think for purposes of the ESI protocol
14 whether we are logging a particular product name in the
01:41 15 redaction that that's necessary to look at right now.

16 THE COURT: Okay. Anything else?

17 MR. PEROCKI: Just issue five, your Honor.

18 THE COURT: Can we put this issue off?

01:41 19 MR. PEROCKI: We can. I think that it would be
20 comfortable to see --

21 THE COURT: Will it come up with their core
22 discovery?

23 MR. PEROCKI: I'm sorry?

01:41 24 THE COURT: Will it come up with in connection with
25 their core discovery?

1 MR. PEROCKI: I don't know that they're going to have
2 core language documents in the core discovery. The core
3 discovery is not subject to the ESI protocol. So, no, they
4 will not come up.

01:42 5 A SPEAKER: So why wait -- I thought that was denied,
6 the ESI protocol.

7 MR. PEROCKI: That was not our understanding.

8 MR. SMITH: And I may be speaking out of turn, your
9 Honor. I thought that was the purpose of the core discovery.

01:42 10 THE COURT: I don't understand the issue.

11 MR. PEROCKI: I -- whether or not the core discovery
12 should be produced in conformance with the ESI protocol.

13 THE COURT: Why shouldn't it be?

14 MR. PEROCKI: That this was the ESI Protocol. That's
01:42 15 not what -- it was our understanding that shouldn't.

16 MR. SMITH: I may be speaking out of turn on that
17 issue. I -- when we first talked about core discovery we were
18 saying they said it didn't have to subject to the ESI
19 protocol.

01:42 20 THE COURT: No, I don't think they ever addressed
21 that issue but I don't think it's core discovery. It's some
22 of the most important discovery in the case, it should be,
23 produced pursuant to the ESI protocol. Of course. It's
24 critical discovery.

01:42 25 MR. SMITH: Okay. So I don't believe that the issue

1 is relevant to core discovery.

2 THE COURT: Okay.

3 MR. SMITH: And that's being asked here is for you to
4 talk about the purpose of something, but the language of the
5 ESI protocol is not in dispute.

6 THE COURT: If there's an issue with foreign language
7 and/or core discovery, let the court know and we'll deal with
8 it.

9 MR. SMITH: Okay.

10 THE COURT: But this issue because we're dealing with
11 Chinese and Indian companies, it's like we dealt with Japanese
12 with Daichi deserves some attention.

13 MR. SMITH: Understood, your Honor.

14 THE COURT: Deserves some attention. And go on to
15 the translation issue?

16 MR. SMITH: Yeah, we went through that for months.

17 THE COURT: Yes, I know. That's the problem.

18 MR. SMITH: All right. Thank you, your Honor.

19 MS. TOLENDANO: Thank you.

20 THE COURT: Thank you.

21 MR. GOLDBERG: Your Honor, if I can, I just want to
22 clarify our understanding, when we get to core discovery it's
23 not -- our understanding of how we got to the core discovery
24 Order and one of the fundamental principles of that Order was
25 this isn't the kind of discovery that's going to need to go

1 though go through the ESI Protocol from the standpoint we're
2 trying to produce readily available information, not getting
3 into custodial files, not getting into e-mails.

01:44 4 THE COURT: No. Why is there -- I don't think
5 there's -- you're right, we're not talking about custodial
6 files, unless the e-mails specifically list it. We're not
7 discussing about that. Why is there an issue about whether
8 it's subject to the ESI Protocol about bate stamping.

01:44 9 MR. GOLDBERG: Oh, that kind of thing, yeah. I mean
10 certainly we, we --

11 THE COURT: That's what I'm talking about.

12 MR. GOLDBERG: That's why I just wanted to clarify.
13 Yes. Certainly.

14 THE COURT: I know. Sort of mechanical.

01:44 15 MR. GOLDBERG: Yes, some of those are basics will be
16 consistent that they get produced. So we just wanted to
17 clarify where your Honor is coming from.

18 THE COURT: Okay.

01:44 19 MR. SMITH: Your Honor, the concern that we had about
20 not being in conformance with exactly that what is the
21 formatting and the, the -- but in terms of like communications
22 with the FDA, I mean those are probably going to be e-mails as
23 those should be produced in conformance with ESI Protocol.

01:44 24 MR. GOLDBERG: Yeah, I -- that is not -- well, go
25 ahead.

01:45 1 MR. SMITH: Yes, your Honor, if I may. In your
2 Honor's Order on core discovery was footnote one. The purpose
3 of, the purpose of requiring the early production of core
4 discovery without the necessity to have a formal document
5 request is to help identify the genuine issues in dispute and
6 to assist the parties in their effort to timely frame an
7 acceptable ESI Protocol. It was always the understanding of
8 the defendants that the core discovery was the type of off the
9 shelf if you remember Mr. Slater saying, they have a filing
01:45 10 cabinet. They're required under FDA regulation when found
11 that regulation but if they have a filing cabinet, they just
12 pull out this core discovery and hand it to us. That was
13 always the understanding. Clearly your Honor had the same
14 understanding when we were talking about framing the ESI
01:45 15 Protocol after the production of the core discovery.

16 THE COURT: Thanks for bringing that to my attention.
17 If I had to redraft that again, I would say what I intended to
18 mean was not the mechanical stuff we're talking about but the
19 custodian/search term. That's why the core discovery is so
01:46 20 relevant to help the defendants identify -- or plaintiffs
21 identify who the appropriate custodians and search terms are,
22 not whether documents should be bated stamped or not.

23 MR. SMITH: You know, your Honor --

24 THE COURT: But in terms of the e-mails, let's deal
01:46 25 with the issue after you produce -- let's see where -- what

1 the defendants produce. If we don't get the e-mails right
2 away, we'll deal with it. We'll deal with it. Okay? We'll
3 deal it.

4 MR. GOLDBERG: Okay.

5 THE COURT: I think we covered the profile forms,
6 didn't we?

7 MS. COHEN: Yes, your Honor.

8 THE COURT: All right. The discovery confidentiality
9 order. My the concern, the concern I have about the DCO is I,
10 I'd like to get that entered promptly because I don't want
11 that to hold up the production of documents. So, I think
12 there's a provision under the patent rules that if documents
13 are produced before a DCO is entered, they're designated as
14 attorney's eyes only until the DCO is entered and we're
15 following the same procedure here. I don't want a defendant
16 to hold up the production of relevant documents pending a DCO
17 which should be entered, well probably a moot issue because we
18 should get it entered in a matter of days.

19 MS. COHEN: Your Honor, Lori Cohen. I think we're
20 close. We need some guidance from your Honor. As you saw, I
21 think we've brought it a lot closer than we have in the past.
22 We have perhaps eight or so issues going through it. So I'm
23 hopeful we can get it entered, but, but obviously I understand
24 your point, that we should not hold up the production
25 consistent with the deadline if for some reason we don't have

1 it signed yet.

2 THE COURT: Okay. I'm perfectly willing to go
3 through -- do you want to take a break or do you want to still
4 plow through? What's your pleasure? Let's go through the
5 issues.

6 MS. COHEN: Okay. And I know Mr. Slater has been
7 involved in his side and my team has been involved and I'll
8 try to --

9 THE COURT: Why can't use the same order we used in
10 Benicar is beyond me frankly.

11 MS. COHEN: And we have been using that. I think
12 we're down to, you know, again just a handful of issues. I
13 think perhaps I would say some small ones and two kind of
14 overarching ones. So if we can get your thoughts on it, your
15 Honor, we should be able to wrap this up, but I think -- and I
16 don't even to want to take credit to good collaboration on it
17 because others on my team have done it but I think they've
18 really bridged a lot of gaps and have worked well getting,
19 getting to this point. But I think we're, we're, we're close.

20 I don't want you to think that we haven't overcome some
21 hurdles there. But I think the difference in Benicar on this
22 point goes to the same issue we keeping raising which is so
23 many defendants and, you know, a lot of different complexities
24 that require additional concerns, we've obviously tried to
25 manage all the comments and bring them to you in a simulated

1 fashion. So, I just try to go through quickly maybe we'll be
2 able to knock them off. On page -- and I'm sure Mr. Slater
3 will jump in if I, if I misstate and I assume your Honor has
4 the, the highlighted version with the blue for the plaintiffs'
5 version and red for the defense. And this is on page --

6 MR. SLATER: You're going to go through each of
7 these?

8 THE COURT: I don't have a color printed.

9 MS. COHEN: You want me to give you a color copy?

10 THE COURT: No.

11 MS. COHEN: You sure?

12 THE COURT: No.

13 MS. COHEN: I have it.

14 THE COURT: Sure.

15 MS. COHEN: Take one last copy back.

16 THE COURT: I don't want your work product.

17 MS. COHEN: Oh, no, no. It should be in color.

18 THE COURT: Thank you very much.

19 MS. COHEN: Adam, do you have a color copy?

20 MR. SLATER: I do.

21 MS. COHEN: Okay. We're good.

22 THE COURT: Okay, what page are we starting on?

23 MS. COHEN: So we'll start on page two. And, Adam,
24 I'm sorry, Mr. Slater the formality you'll go through. Okay.

25 So, on page two, and again it's, it's the blue

01:50 1 highlight. So that means plaintiff is crossing that out. And
2 that's what we want to include there. So here basically
3 they're crossing out the language and/or submitted to the
4 Court in connection with a motion or hearing. We think that
5 should remain in, should remain in because, you know, we'll
6 get to a sealing issue at the end. But we think that that
7 language is certainly not prejudicial and to be -- I mean
8 there could be a motion or hearing at trial.

9 THE COURT: What's the problem with that?

01:51 10 MR. SLATER: I don't think that documents submitted
11 with a dispositive motion or pretrial hearings or hearings
12 connected to a trial would be subject to confidentiality. I
13 would think at that point there's not, there's not an ability
14 to be hiding the documents or sealing the documents. I mean
01:51 15 if we try the case, for example, my understanding of the trial
16 a dispositive motion may be related to those are not subject
17 to confidentiality.

18 MS. COHEN: But, your Honor, they could be and that's
19 why we think this language is important and we can always take
01:51 20 that up on a case by case basis.

21 THE COURT: Yes.

22 MS. COHEN: Thank you, your Honor. Also on page two
23 under number one, there's another cross out of some small
24 language by plaintiffs where it says: Persons noted or
01:51 25 subpoenaed for deposition actual or potential witnesses and

1 their respective counsel. We have a similar issue where again
2 this could come up and we don't think that that language is in
3 any way --

4 THE COURT: Who's the potential witness?

01:51 5 MS. COHEN: Let's see. The actual potential witness.
6 That could be somebody who is, is in a deposition and not
7 being deposed, but they're a potential witness from the, from
8 the company, who is from the company, could be there
9 potentially. So sort of the broad language to protect any
01:52 10 such communication.

11 THE COURT: That could be anyone in the world.
12 Potential witness.

13 MS. COHEN: But, but it could be, but they would have
14 to be again provided this confidential information. So, we're
01:52 15 envisioning if someone a witness at a deposition for, example,
16 is there, they should have to be subject to the protective
17 order. That was one of the I think examples that we came up
18 with there. You could have somebody sitting in. Again we
19 could have multiple witnesses there. So we just think that
01:52 20 somebody is there, it's very easy even to do it, either have
21 him sign it or he could do it even verbally just to make sure
22 that potential witnesses could may be in court or called in to
23 testify or at a deposition, you know, if they see something
24 confidential that they are subject to the Protective Order as
01:53 25 well.

1 THE COURT: A trial, potential trial witnesses?

2 MS. COHEN: Or, or deposition witnesses.

3 THE COURT: Mr. Slater?

4 MR. SLATER: Well, the trial I don't think it

5 applies. I haven't even envisioned they were trying to seek

6 that, but I mean obviously can't -- I think that this is a

7 pretty important issue. If somebody is -- if this is really

8 applies to a third party. If somebody is a company employee,

9 I mean they're subject to this. That's not a issue.

10 THE COURT: Right.

11 MR. SLATER: But, you know, take for example a

12 treating doctor, you're going to get into a deposition and

13 intimidate the doctor with a Protective Order and tell the

14 doctor you can't talk about this after you leave? I mean, if

15 somebody is a witness, they're a witness. They have no

16 obligation to the litigation. What they say about signing it.

17 Then what if they say, okay, we can't take your deposition? I

18 mean this is -- it's something that we didn't do in Benicar.

19 I haven't seen in other litigation where witnesses who get

20 brought in as third parties are subject to the Protective

21 Order. You can mark the transcript, you can mark the

22 transcript as confidential and you can mark the Court's

23 transcript, but the witness itself? This is just a person in

24 society who shouldn't be bound by this because they're just

25 roped in because someone decided to question them under oath.

01:54 1 MS. COHEN: And, your Honor, I'll respond to that
2 point about the doctor example. If they're there, and they're
3 being questioned on their care and treatment, that it would be
4 one thing, but if they're going to be shown company documents
5 that are protected and subject to these, then, yes, they
6 should be able to agree whether verbally or in writing, we
7 agree to abide by this, by this Protective Order. It's not a
8 big burden.

01:54 9 THE COURT: Let's leave it out, but if there's a
10 reason that a particular individual needs to be bound by this
11 Order, make an application and it will be heard.

01:54 12 MS. COHEN: As a fallback position, could I, could I
13 lobby to just take out the word or potential witness so that
14 we leave in a person noticed or subpoenaed for deposition,
15 actual witnesses so we just cross out or potential witness
16 which seems to give you and Mr. Slater the most concern about
17 the breadth and we leave the rest in?

01:55 18 MR. SLATER: We obviously disagree. I mean our, our
19 -- I mean the potential witnesses is being just a tiny thing,
20 tiny word in that sentence.

21 THE COURT: Leave it out. If there becomes an issue,
22 make an application.

23 MS. COHEN: Thank you, your Honor. Then we will go
24 to the next one is let's see.

01:55 25 MR. SLATER: Page five.

01:55 1 MS. COHEN: Page five, yes? Bless you. And that is,
2 page five under definition B. It starts on the bottom of
3 four. Let's see. But the language that we're talking about
4 is where plaintiffs added in in blue top paragraph B, the
5 language starting with nonetheless and it's including in there
6 basically language about sanctions that should it be
7 demonstrated to the court that a producing party has abused
8 the discretion contemplated by the language of this paragraph
9 that says unduly burdened, obviously the court shall entertain
01:56 10 a petition for sanctions.

11 Our position on that, your Honor, is that that is not
12 necessary, as he's already said today several times and we
13 strongly believe that the parties should have trust that there
14 are Rules that govern us, there are ethics, obligations that
01:56 15 we're all aware of and committed to. And, so, we don't think
16 that's needed. However, to the extent that that is going to
17 be included, we ask that paragraph 29 or the corollary
18 language be included and that is later on page 30. So, in
19 other words, what's kind of the goose gander here, your Honor
01:56 20 and --

21 THE COURT: Here's what I was thinking.

22 MS. COHEN: Uh-hum. Yup.

23 THE COURT: It goes both ways. If there's an
24 over-designation, the other side can make an application for
01:57 25 relief. But if there's an undue request to remove

1 designations.

2 MS. COHEN: Uh-huh.

3 THE COURT: There should be an application for
4 sanctions on your part. I'm not saying there will or there
01:57 5 won't, but plaintiffs want to be protected if the defendants
6 over-designate. The defendants should be protected if the
7 plaintiffs say, we want you to remove designations on every
8 single one of your three million documents you produced in the
9 case. So I want, it should be I think for both sides.

01:57 10 MS. COHEN: So we'll, we'll -- if we're going to keep
11 that in, then we'll, we'll propose new language to make it
12 equal.

13 THE COURT: Right.

14 MS. COHEN: Our language. That, that -- we'll make
01:57 15 sure that it's mutual and equal and we'll work on some
16 language on that.

17 THE COURT: Mutual, yeah. I would at the end it
18 says, the court shall entertain a petition for sanctions. I
19 would say, an application for appropriate sanctions may be,
01:58 20 may be made.

21 MS. COHEN: Okay.

22 THE COURT: And again it should go both ways.

23 MS. COHEN: So we'll work on that language then. And
24 then in the next provision that's at issue is on page 12 I
01:58 25 believe which again goes to I think the first issue. I may

1 have missed one, your Honor. Let me make sure I have that
2 one. Page 12.

3 MR. SLATER: It's section B. It's B right next to
4 hearings or transcripts and --

01:58 5 MS. COHEN: Right. And that's the same thing here
6 where we wanted to be consistent with what we said earlier,
7 include the language preparing the trial transcripts.

8 THE COURT: Oh, I see all portions of any --

9 MS. COHEN: I think that's similar to the first one
01:59 10 you ruled on?

11 THE COURT: Okay.

12 MR. SLATER: And, your Honor --

13 THE COURT: This doesn't govern what happens at trial
14 though. That will be a whole separate issue that Judge Kugler
01:59 15 will decide. I don't think we need to address on May 29th,
16 2019 how to deal with documents at trial.

17 MR. SLATER: And my concern would be also, I mean the
18 hearing is a public forum. So, you know, if it's discussed in
19 the open courtroom, it's public.

01:59 20 THE COURT: Unless the -- well --

21 MR. SLATER: A newspaper reporter can be in here
22 right now taking down everything. It's public. It's a public
23 courtroom.

24 THE COURT: Right. If you order a copy of the
01:59 25 transcript, there's a procedure to seal a portion of the

1 transcript if you want. You can make an application for that.

2 MS. COHEN: Can we have a provision which we'll get
3 to on sealing? I think we had agreed there should be some
4 kind of a sealing provision in this at the end, but we want to
5 get your guidance on exactly how to include that.

6 THE COURT: Okay, just to avoid any confusion. Are
7 we okay with page 12, paragraph B where the hearing or trial?
8 All portions of any --

9 MS. COHEN: Yeah, we wanted to include the language
10 the plaintiff had scratched out the words preparing for trial.
11 I think that should remain in.

12 THE COURT: Definitely take out trial.

13 MS. COHEN: Okay.

14 THE COURT: Because that has nothing -- we're not
15 going to deal with the trial.

16 MS. COHEN: So just leave the word hearing?

17 THE COURT: Hearing is fine because there's a
18 procedure in the Local Rules about sealing a transcript.

19 MR. SLATER: Okay.

20 THE COURT: They have to make an application.

21 MS. COHEN: So I think the next, the next one is
22 probably the biggest issue, your Honor, and it starts on page
23 15 and it's Paragraph 20. I would say it's probably a core
24 disagreement on de-designation. I think you saw our
25 description. And here again what -- they're a little bit to

1 Benicar given the complexities, the number of defendants, the
2 different issues and that's why to your first question why
3 weren't we just using the same process. So here --

4 THE COURT: Why is it different?

02:01 5 MS. COHEN: Well, because there's in terms of more
6 defendants and more chance for risk. More chance, you know,
7 if -- with a lot of communications going on. I know your
8 Honor is thankfully spared from all the e-mails and letters
9 that we have. We have different groups, different committees,
02:01 10 new defendants coming in and out, defendants perhaps on the
11 sidelines. So it's just a matter of making sure that nothing
12 gets missed. This is what we're proposing here in our
13 language the plaintiffs have crossed out is just having one
14 extra step in the process that that --

02:01 15 THE COURT: So what are you proposing?

16 MS. COHEN: So what we're proposing is if you look at
17 page 15 to 16 there, again that, that, the -- during the
18 confidentiality de-designation meet and confer process that
19 that the documents will essentially remain confidential until
02:02 20 a determination is made. Well, the plaintiffs are just
21 generally speaking I'm summarizing this, all the verbiage here
22 is they're saying basically they will give notice of, of, you
23 know, of de-designation. We'll have a certain amount of time
24 to, to respond and if we don't, basically then it's waived.
02:02 25 So we're saying no. There needs to be until the court makes

1 the determination, things remain confidential.

2 THE COURT: Suppose, hypothetical. Mr. Slater writes
3 a letter saying we want these documents de-designated, it
4 falls through the cracks and, you know, the defendants don't
02:02 5 get to it. Are you saying then that remains confidential
6 forever?

7 MS. COHEN: That is, that is, that is what we're
8 saying, with all the different defendants and all the
9 different complexities there, that, yeah, that someone has to
02:03 10 make a motion and that's an equal mutual obligation that one
11 side or the other should make a motion, not just send a
12 letter, you know, and perhaps -- I mean, you know, everyone
13 does their best, but that by virtue of setting a motion and
14 time lapsing, that then basically the protection and the veil
02:03 15 of protection is removed because certain time passes that we
16 believe this should actually be a motion because I know you're
17 probably thinking well, Miss Cohen, that sounds like a lot of
18 extra motions for the court. We -- actually it would be less
19 because what will happen we fear is that this is going to
02:03 20 cause a cascade of problems.

21 THE COURT: So wouldn't the burden then -- in other
22 words, the de-designation burden would be put on the
23 plaintiffs if the defendant doesn't get back to the
24 plaintiffs.

02:03 25 MS. COHEN: Or at least a continued --

1 THE COURT: That doesn't seem fair, does it?

2 MS. COHEN: Well, I think it does, your Honor, given
3 what's at risk here is the potential for confidential
4 information subject to the Protective Order being, you know,
5 being left to bear.

6 THE COURT: How many millions of documents were
7 produced in Benicar?

8 A SPEAKER: It was over a hundred million pages.

9 THE COURT: A hundred million pages. We didn't have
10 one issue, not one, where this issue came up. Not one. So I
11 don't see why we have to deviate from the procedure. You
12 haven't told me anything that's special about this case, why
13 the defendants can't follow the Court Order. Now if there's a
14 problem with timing, X days, we can deal with that. That's
15 easy. But the burden has to be on the defendants to move the
16 de-designate rather than putting it on the plaintiffs to move
17 the de-designation. That's just unfair.

18 MS. COHEN: I think that the difference here, your
19 Honor, to answer your specific question is is here we have a
20 lot of different lines of communication, a lot of different
21 defendants and in Benicar, which all refer back to, you know,
22 there was basically one defendant and there's easy
23 communication. I mean here there were a lot of different
24 parties. Some people may, you know, may not be in the line of
25 communication. So that's, that's the distinction.

1 THE COURT: I don't see it, Miss Cohen. I'm sorry.
2 The Order is clear.

3 MS. COHEN: Okay.

4 THE COURT: The Order says they have an obligation to
5 notify the designating party. They send a letter to that
6 person or that counsel. The Order will be clear. You have X
7 days to do something about it, and if you ignore it, you have
8 to follow the Court Order. It's just inherently unfair to put
9 the burden on plaintiffs to move to de-designate documents
10 that the defendants designate. That gives the defendants an
11 incentive to over-designate. It gives them an incentive to
12 ignore plaintiffs' communications. I don't see it, Miss
13 Cohen.

14 MS. COHEN: I understand, your Honor. So what I
15 would suggest because you did mention it, a good point,
16 perhaps we need a little cushion of some extra time. So maybe
17 on page 16, on the bottom there, which is, which includes
18 language, the plaintiffs added about timing, perhaps we can
19 discuss a little more time. So instead of 14 days, 30 days,
20 something like that might alleviate your concerns.

21 THE COURT: How about 21 days.

22 MS. COHEN: Okay.

23 THE COURT: Follow the Benicar procedure but give the
24 defendants more time.

25 MS. COHEN: Okay.

1 THE COURT: Is it clear that the defendants -- I'm
2 sorry. The plaintiffs have to notify the designated party not
3 just the defendants' liaison counsel or both?

4 MS. COHEN: Well, we'll make -- we'll add some
5 language to make sure, we both want to make sure that's clear.
6 Do that.

7 THE COURT: And the designated party.

8 MS. COHEN: Okay, we'll make sure we add that.

9 THE COURT: I think that's eminently fair.

10 MS. COHEN: Okay. And then the next, hum, I think
11 page 17 is I again think that relates to what we just
12 discussed. So unless Mr. Slater disagrees, I think we can
13 forge ahead. And then same with 18. Now on -- let's see.
14 Page 19.

15 MR. SLATER: Paragraph 21 I think. All of paragraph
16 21.

17 MS. COHEN: Yeah, let me make sure the designation
18 order --

19 MR. SLATER: Yeah, if I get you confused. If you
20 look at paragraph 21, your Honor. Basically, our position is
21 if you start at the bottom of page 17 where paragraph 21
22 starts, if you read all the way to page 19, the beginning of
23 the first full paragraph ends with the word, the first
24 sentence ends with Federal Rule of Evidence 502.

25 THE COURT: I'm sorry. Are we on page 19?

1 MR. SLATER: Well, I start on page 17, paragraph 21.
2 You can read it from there.

3 THE COURT: I got it.

4 MR. SLATER: To Page 19 to the end of the first
5 sentence in the first full paragraph which is 502. Our
6 position is plaintiff is that's where the provision should
7 end. And we can probably -- we can agree to some of the
8 changes that counsel wanted within our proposed language.
9 Because what happens is if you go beyond the word 502, for
10 example, that first sentence about inadvertent production of
11 documents and information subject to work product immunity,
12 etcetera, it's basically a recitation of what's already in the
13 first sentence of the first paragraph. Basically what
14 happened was, we have the Benicar language and then the
15 defendant put in that I understand why they did it, but they
16 put in basically the reformulation of the same provision which
17 we don't think is really necessary and, you know, for example,
18 we can agree to change a few of the, the time limits where we
19 had said as soon as practical, the defense wants ten days,
20 that's fine. They want to promptly to be defined as seven
21 days, that's fine.

22 MS. COHEN: Fine. Right.

23 MR. SLATER: So that's fine. But I think beyond
24 that, I think should end with 502 and the rest should be
25 deleted.

02:09 1 MS. COHEN: And, your Honor, on this paragraph, 23,
2 we agree that obviously 502 is the applicable provision here.
3 We think that we added beyond where the plaintiffs wants to
4 stop is meaningful and helpful and we don't think it causes
5 any duplication or confusion. I think that from the time
6 frame issues that we -- that Mr. Slater mentioned we agree
7 adding that and then --

02:09 8 THE COURT: What if we say, this Order incorporates
9 the provisions of Federal Rule of Evidence 502? Why do we
10 need anything after 502?

02:09 11 MS. COHEN: It's giving more certainty to the
12 process. We, we -- again there's a great concern about, you
13 know, inadvertent -- all these big issues for a lot of
14 companies and a lot of defendants. So, I want to make sure
02:09 15 I'm representing everyone's concerns and there are a lot
16 express provisions, this is a larger group, I don't want to
17 take my obligation lightly on that, but I think that this
18 language, it's, it's basically explaining 502 and not adding
19 any more burdens. We don't understand why the plaintiffs, you
02:10 20 know, have an issue but I think it gives this entire group, we
21 worked very hard to get here, comfort of that language. I'm
22 not sure what the problem is.

23 THE COURT: Well, Mr. Slater, if the only reason is
24 you think it's duplicative, could we just leave it in?

02:10 25 MR. SLATER: If it's not identical, no. It's

02:10 1 duplicative but then there's certain burdens that are placed
2 in the language. For example, I think that it goes beyond the
3 obligation, if you get a document that's clearly privileged
4 and you accidentally give it to the other side, but that's one
5 of our obligations. I think it goes beyond that to actually
6 having to go and get documents back from people and it sort
7 of, it sort of, it sort of puts burdens on us. It puts a
8 burden on us doing the Order to scrub documents and determine
9 whether it was inadvertently privileged or produced privileged
02:11 10 documents.

11 THE COURT: Why don't we just say in whatever
12 language you want to use and incorporate the provision of 502
13 on everything after 502 and that paragraph is out. If all it
14 is intended to do is describe 502, that's not needed. Okay?

02:11 15 MS. COHEN: Yeah, I think we talked about the ten
16 days and seven days. The other part, to make sure I cover
17 this is, hum, that the parties may contact the court for a
18 telephone conference, so it gets more specific about that.

19 THE COURT: That's fine. That's okay.

02:11 20 MS. COHEN: And either party may file a formal motion
21 within ten days.

22 MR. SLATER: I'm sorry, Miss Cohen. But that's
23 already in the part that we -- that's in there already.

02:11 24 MS. COHEN: And we'll check on that and make sure
25 that -- I just want to make sure to have some specificity of

1 the provision.

2 THE COURT: I think you'll work it out.

3 MS. COHEN: Okay. So that's 21 which -- 20 and 21
4 were the big ones, your Honor. So we're getting very close.

02:11 5 THE COURT: Okay.

6 MS. COHEN: And let's see. I think on page 27.

7 THE COURT: How about 25, page 25?

8 MS. COHEN: Okay, 25, right. This is what I referred
9 to earlier on the sanction, but I think your Honor already
02:12 10 kind of suggested a method for dealing with that.

11 THE COURT: Okay, so that's out on page 25.

12 MS. COHEN: Yeah. Let me look at this one real fast,
13 your Honor. Oh, there. I'm sorry. Twenty-nine, paragraph 29
14 and 25 is the same issue but a deposition. So it is a
02:12 15 different paragraph. I apologize. This is one where we
16 believe again a deponent should be at least whether in writing
17 or, you know, again on the record at least subject to the
18 Protective Order, especially if it's a third party. A similar
19 issue to what we addressed earlier, your Honor.

02:13 20 MR. SLATER: Your Honor, we talked about this
21 deponent or trial witnesses, essentially being forced to state
22 on the record. I'll be bound by this Protective Order. This
23 is a third party witness who's being brought in as a witness.
24 I think it's very intimidating.

02:13 25 THE COURT: What are we talking about, the first

1 sentence?

2 MR. SLATER: It goes through-- it should be, there
3 should be a red line or blue line, whatever color it is, blue
4 line Protective Order. I guess --

02:13 5 THE COURT: Take it out. Take it out. That's out.
6 Take it out.

7 MS. COHEN: Page 27 and 28 is the sealing provision
8 and I think we agree that there should be something and we
9 just thought that we would talk to you about --

02:13 10 THE COURT: Page 27 and 28?

11 MS. COHEN: I'm sorry. Page 27, paragraph 31.

12 THE COURT: Easy. Do it one sentence. All requests
13 to seal documents comply with Local Rule 5.3. That's it.

14 MR. SLATER: Yes.

02:14 15 THE COURT: No more, no less.

16 MS. COHEN: Okay. And --

17 MR. SLATER: The rest of the language, we can talk
18 about this is actually beneficial to us. I think it gives us
19 a little breathing room. And this is the language from
02:14 20 Benicar.

21 THE COURT: All you have to do is comply with Rule
22 5.3.

23 MR. SLATER: It gives us the, the cushion basically
24 like we're about to file motions to not have to double the
02:14 25 documents before we file. So it gives us the right to file

1 claim holders, then confer and see if documents will be
2 subject to because it gives everyone breathing room.

3 THE COURT: Be careful. I mean I'll be the first one
4 to acknowledge Rule 5.3 is incredibly difficult to deal with.

02:14 5 A couple of things that had to be done to try to make it
6 easier is if a motion is filed, you don't have to file a
7 motion to seal for each filing. You can wait until the end
8 and then be aware of that Rule and then if plaintiff files the
9 defendants' confidential documents, you don't have information
02:15 10 to justify sealing, you can just say that under the Rules they
11 have whatever it is, ten days or two weeks to submit something
12 and if they don't submit something, motion denied.

13 MS. COHEN: We'll work on that language and either
14 include a reference to that or Benicar language and see if we
02:15 15 can reach agreement on that.

16 MR. SLATER: I think everything you just described we
17 addressed here. So I think it should -- like, for example,
18 you just said the designated party has to file the motion
19 ultimately, or is designated as confidential if someone's
02:15 20 going to seal it, otherwise it's, it's waived.

21 MS. COHEN: We'll --

22 THE COURT: Anything you come up -- any procedure to
23 simplify the sealing process, I'm all for it because Rule 5.3
24 is, it's, it's ...

02:16 25 MS. COHEN: We'll take another close look at the

1 language here and that Rule and we can work that out.

2 THE COURT: I can tell you in Benicar I don't think
3 we really had any problem with sealing. I can't remember
4 instances where it became a problem. But that's because
5 hardly any motions were filed.

6 MR. SLATER: There were some. It's work. Obviously
7 you have to redact out the documents or work it out, but the
8 Rule is what it was.

9 MS. COHEN: Okay, thirty is the last one, your Honor,
10 I kept referring to and this is the one that goes with
11 sanctions without being combined with the earlier provision
12 but I think you gave us guidance already. So we'll come up
13 with -- yeah.

14 THE COURT: Yes, it's kind of scary.

15 MS. COHEN: Okay. We'll just include that additional
16 mutual language in this earlier one.

17 THE COURT: Yeah.

18 MS. COHEN: I think that covers it. Sorry for being
19 so tedious.

20 THE COURT: That's okay. I'm glad we got through it.
21 So let's see if we can finalize this prior to the next call
22 in. I'd really like to get this entered so it doesn't delay
23 document production.

24 Okay, it's twenty after 12. We have a few more issues
25 to deal with. Tell me what your pleasure is. Do you want to

1 take a lunch break? Do you want to take a ten-minute break
2 and then we'll plow through this? What's your pleasure?

3 MR. GOLDBERG: We're all in for a break.

4 MR. SLATER: We're all in for a ten minute break.

5 THE COURT: Okay, let's take a ten-minute break.

6 We'll go through it. I don't think we have a whole lot more
7 and we'll get through it. So let's come back at 12:30.

8 (Recess)

9 (The following took place in open court).

10 THE DEPUTY COURT CLERK: All rise.

11 THE COURT: Okay. I think the next issue on the
12 agenda is core discovery. I know the current due date
13 defendants are asking for more time. I guess the issue I have
14 with that is this. Defendants, this is a -- this is supposed
15 to be the easier information to gather and put together and I
16 -- I mean you're going to get an extension, but I'm just
17 reluctant to set a precedent here that about giving parties
18 leeway to answer discovery at their leisure. That is the only
19 concern the court has.

20 MR. GOLDBERG: Your Honor, this is -- I mean we are
21 really just asking for a short amount of time with respect to
22 a narrow category and search documents under 635 which are
23 not, not the recall documents. Those are going to be
24 produced. The Anda (sic) files is going to be produced. The
25 master file. That's all going to be produced on time. This

1 is stuff that gets back to the, you know, potentially nine
2 years of history. So we do need a little time to get through
3 those and get those produced.

02:37 4 THE COURT: So the date, what date do you want, Mr.
5 Goldberg?

6 MR. GOLDBERG: We're -- we asked for 45 days. Due
7 August first.

8 THE COURT: Can we live with 30? Yes, we can.

9 MR. GOLDBERG: We can.

02:37 10 THE COURT: So, let's make it July, take it to
11 Friday, July 19th, the documents under paragraph 6-A-3-5 will
12 be produced on a rolling, on a rolling basis if there's good
13 cause to consider any requests.

14 MR. GOLDBERG: Sure.

02:37 15 THE COURT: Something I want to mention about this.
16 Oh, from the plaintiffs' perspective, you may have issues with
17 the productions. I know two people said they don't have
18 control overseas. I'd rather just deal with all of those
19 issues regarding core discovery at one time. So let's save
02:38 20 them up until you get all the documents so we can get all
21 those issues addressed at one time. All right? If there's
22 parties who say they can't produce documents from overseas,
23 then like I said, unfortunately we may have to get into the
24 issue about control. If we have to, we have to.

02:38 25 All right. Okay. So, anything else we need to address

1 with regarding the core discovery?

2 MR. GOLDBERG: No, your Honor.

3 THE COURT: Documents. What's the next one? Oh, we
4 did document repository. The parties are talking. So, we can
02:39 5 leave that. Coordination of related cases? Any issue -- is
6 Mr. Orlando here?

7 MR. ORLANDO: I am, your Honor. Hello.

8 THE COURT: Mr. Orlando, did you work it out with the
9 group? You're not going to fly solo in State Court?

02:39 10 MR. ORLANDO: Mr. Goldberg and I had the opportunity
11 to speak and I agree with his proposal MDL.

12 THE COURT: So we'll coordinate the New Jersey State
13 and Federal, Mr. Orlando.

14 MR. GOLDBERG: Yeah, I think, I think the issue, your
02:39 15 Honor, is that that's going to be easy for us to coordinate.
16 What we had proposed and what Mr. Orlando I think is agreeing
17 to is for this court to reach out to the Judges in the other
18 courts to create some kind of joint coordination order. We'll
19 propose a draft to your Honor if that's helpful. We can even
02:39 20 run it by --

21 THE COURT: That's a great idea.

22 MR. GOLDBERG: We'll give it to you and then work
23 with the other Judges, and we can get that entered by all of
24 the respective State Court Judges as well. This way we're
02:40 25 covered.

1 THE COURT: Okay. I think that's a great idea. Mr.
2 Orland, we'll get you to the finish line faster in State
3 Court.

4 MR. ORLANDO: There are more cases coming in the
5 State Court and we have a hearing on July 18th before the
6 Assignment Judge in Middlesex County. We've agreed to
7 consolidate the two presently pending cases I think with Judge
8 Crisatello?

9 MR. GOLDBERG: That's correct.

10 MR. ORLANDO: And if you can just run any proposal by
11 me first, I'd appreciate it.

12 THE COURT: Your cases, Mr. Orlando, are?

13 MR. ORLANDO: Runo and Orłowsky. They're injury
14 cases.

15 THE COURT: The other cases, will your office be
16 filing them?

17 MR. ORLANDO: Yes, sir.

18 THE COURT: All right. Are those also individual ESI
19 cases?

20 MR. ORLANDO: They are, sir.

21 THE COURT: Okay.

22 A SPEAKER: And, your Honor, we also have several
23 plaintiffs from New Jersey that we're going to be filing in
24 State Court of New Jersey as well. So I think there are other
25 attorneys that are the PMC.

1 THE COURT: Do you think New Jersey -- I forgot what
2 they call it in New Jersey.

3 MR. NIGH: Consolidated.

4 THE COURT: `Do you think they're going to do that in
5 New Jersey with these cases?

6 MR. NIGH: I do.

7 MR. ORLANDO: Yes.

8 THE COURT: Are you going to move for that?

9 MR. ORLANDO: Yes.

10 THE COURT: Okay.

11 MR. ORLANDO: I was waiting for Mr. Nigh's case to
12 appear.

13 THE COURT: Do they have a sort of a target for how
14 many of those types of cases have to be pending before they
15 consolidate them?

16 MR. ORLANDO: There's no real specific number.

17 MR. GOLDBERG: You're talking about filing.

18 MR. SLATER: I would be surprised if the, if the
19 Supreme Court would do that before those 25 cases or so. And
20 they would need a promise that more are coming.

21 THE COURT: Do you think we'll get there?

22 MR. NIGH: We got it in Benicar when there were
23 twelve. So, since then the order has gone up. But, yes, I
24 think we're going to get there probably a matter of two to
25 three months before we have the nexus to file in New Jersey.

1 THE COURT: Thank you, Mr. Orlando.

2 MR. GOLDBERG: Your Honor, before we go off on this
3 issue, there's a couple of questions. On those actions, at
4 least right now the GHP defendants are the only defendants in
5 Runo and Orlowsky are planning to open that up to the other
6 defendants?

7 MR. ORLANDO: Absolutely.

8 MR. GOLDBERG: Okay.

9 MR. ORLANDO: On my pending cases.

10 MR. GOLDBERG: Okay. Your Honor, I think, I think
11 one of the concerns here and given the fact that we have a
12 hearing on the eighteenth in these cases, you know, we need to
13 get these cases to be working in lockstep with the MDL as soon
14 as possible. We'll get you a draft joint coordination order,
15 but our joint coordination order is one we envision that
16 putting these cases on the same schedule from a pretrial
17 standpoint. The State Court cases can participate in
18 discovery in this case.

19 THE COURT: Don't they have to -- doesn't the State
20 Judge have to consent to that?

21 MR. GOLDBERG: Well, that's why what we're asking
22 for, maybe it wasn't clear, is for this Court to reach out to
23 the State Court Judge.

24 THE COURT: Judge Kugler is going to do that, a
25 hundred percent.

1 MR. GOLDBERG: Right. And we'll give you a form that
2 we think would be -- would achieve that. But what --
3 depending on the timing, we don't want these cases to move
4 forward, you know, in any material respect.

02:43 5 THE COURT: So you have to talk to the State Court
6 Judge.

7 MR. GOLDBERG: Yes. And so we have and one of the
8 challenges here is we've talked to them. They agreed to
9 coordination, but when it comes time to put pen to paper on a
10 stipulation, it breaks down.

11 THE COURT: Is your conference on June 18th.

12 MR. GOLDBERG: July 18th, sir.

13 THE COURT: July 18th. Okay.

14 MR. ORLANDO: At 8:30 in the morning.

02:43 15 MR. GOLDBERG: We will get you a draft joint
16 coordination order.

17 THE COURT: In concept, Mr. Nigh, Mr. Orlando, in
18 concept we don't have the language yet. Do you have an
19 objection to putting the State cases on the same track that
20 these cases are?

21 MR. ORLANDO: No, Judge.

22 MR. NIGH: No, Judge.

23 THE COURT: Okay. It would be up to the State Judges
24 though, if they go along with that. Right?

02:44 25 MR. GOLDBERG: Right. And that's where we're asking

1 for your Honor and Judge Kugler to reach out to those Judges
2 to see about facilitating a coordination so that we have both
3 courts entering the same coordination order.

02:44 4 THE COURT: I think it makes perfect sense. When we
5 get -- well nowadays since New Jersey and Federal follow
6 Daubert, we don't have to have two Daubert hearings anymore.
7 Right.

8 MR. GOLDBERG: Right.

9 THE COURT: We only have one Daubert Hearing.

02:44 10 MR. SLATER: Essentially, New Jersey has not adopted
11 Daubert.

12 THE COURT: Yes, I thought they did in the Supreme
13 Court decision.

02:45 14 MR. SLATER: They said that it's not adopted. It's
15 explicit. We're not a Daubert jurisdiction, but you can look
16 at the Daubert factors and consider them as applicable in a
17 particular case. I'm sorry to say that, but I'm very
18 protective of it.

02:45 19 MS. COHEN: We agree with your description, your
20 Honor.

21 THE COURT: We'll have two Daubert hearings and just
22 like when with Benicar we welcome coordination with the State.
23 If we go there or they come here, that's perfectly fine with
24 us. I'll go just to make this efficient and move the case
02:45 25 along and anything we can do in that regard we'll do.

02:45 1 MR. GOLDBERG: Thank you, your Honor. You'll notice
2 in the joint submission, there are two other cases, not in New
3 Jersey. There's one in Illinois and one in California and we
4 would like, what we're hopping is that the Court will reach
5 out to those Judges to bring them under the tent, so-to-speak,
6 to the extent they're willing to do that. And we would like
7 to have this joint coordination order applicable going forward
8 so that should a State Court case be filed, we can get, you
9 know, we can get that case coordinated.

02:46 10 THE COURT: Okay. Shanov versus Walgreens' case.
11 That's a Chicago case. Will that eventually become part of
12 this MDL?

13 MR. GOLDBERG: Not if it doesn't get removed to
14 Federal Court.

02:46 15 THE COURT: We have no control over that. Right?

16 MR. GOLDBERG: Right now it's in State Court. They
17 filed a claim against one of the -- a claim against Walgreens
18 the only defendant, so they can stay in State Court.

19 THE COURT: Are those plaintiffs' lawyers here?

02:46 20 MR. GOLDBERG: I don't know if they are. We have
21 joined our client so that we can get the case removed to
22 Federal Court. If not --

23 THE COURT: You mean you represent Walgreens?

24 MR. GOLDBERG: Solko, the manufacturer defendant.

02:47 25 THE COURT: Okay. Solko when you say we, how did you

1 get in that case?

2 MR. GOLDBERG: We're moving to join, we're moving to
3 join that case.

4 THE COURT: Oh, you're going to interplead?

02:47 5 MR. GOLDBERG: Yes, so that we can get the case
6 removed because we're subject to an indemnification.

7 THE COURT: Can you do that?

8 MR. GOLDBERG: In any event. We've moved to do that,
9 yes.

02:47 10 THE COURT: Wasn't it yesterday the Supreme Court
11 said that a counterclaim defendant can't remove a case?

12 A SPEAKER: Home Depot versus Jackson.

13 THE COURT: Are you a plaintiff's lawyer?

14 A SPEAKER: I am.

02:47 15 THE COURT: Are you the fellow from Chicago who won't
16 say --

17 A SPEAKER: I'm not, but I'm sure of the case.

18 THE COURT: Okay. Well that's going to be an issue.

19 MR. GOLDBERG: There's another case in California.

02:47 20 THE COURT: There's two cases in California.

21 MR. GOLDBERG: Two cases in California. Collins one
22 is against Aurobindo.

23 THE COURT: Which is going to be back here, though,
24 right?

02:48 25 MR. GOLDBERG: They've been putting-- the JPML

02:48

1 plaintiffs' lawyer has opposed transferring, the, the
2 conditional transfer order. We're going to file a response to
3 that. We think it's going to end up here. But if it doesn't,
4 that would be another case where we would want to get
5 coordination.

02:48

6 THE COURT: Okay, that makes sense. But it looks
7 like Shanov might be the only stickler. Before, why would a
8 Judge in Chicago want to manage that case when there's going
9 to be hundreds, if not thousands of these cases here?

02:49

10 MR. GOLDBERG: That's our view. And so we think if
11 you or Judge Kugler would be willing to reach out to that
12 Judge with a joint coordination order in hand, perhaps that
13 Judge will come to the view that it make sense to enter that
14 order.

02:49

15 THE COURT: Okay. Thank you.

16 MR. GOLDBERG: Okay.

17 THE COURT: Judge Kugler has every intention to
18 coordinating this case. Issue number 12, Losartan. Mr.
19 Honik, can't we put this -- can't we get all these issues
20 together?

02:49

21 MR. HONIK: Yes. We, we've made no secret, Judge, up
22 until today that we've been slow walking this and --

23 (Laughter)

24 THE COURT: That was one of the questions I was going
25 to ask you.

02:49 1 MR. HONIK: Yeah. But we did it, I think, for good
2 reason. We want to get our sea legs in this case and we felt
3 somewhat skeptical about the degree of information that we
4 understood about Losartan and Irbesartan in terms of the
5 scope, contamination, et cetera. But as sometimes happens,
6 the horse leaves the barn when you're not ready. The horse
7 seems to have left the born. We've had internal discussion in
8 leadership that we're prepared to move the JPML to sweep them
9 in. I think there's a question --

02:50 10 THE COURT: Is there any objection to, there's going
11 to be any objections on the other side?

02:50 12 MR. GOLDBERG: We, we just got that information.
13 There are different views on this within the defense group and
14 we haven't polled that. And I mean there have been defendants
02:50 15 who raised the point. They don't think these drugs should be
16 added. Maybe it has to do with the number of cases. Maybe it
17 has to do with the defendants as they're pled. A lot of the
18 defendants they think it should all be together, but, you
19 know, that's, that's something that we can raise when they
02:50 20 file that motion. Maybe there will be an objection.

02:50 21 MR. HONIK: This is sort of an echo from an argument
22 that I heard when we argued to the JPML originally. So that's
23 fine. I mean the defendants can stake out whatever position,
24 but it seems clear to us that it makes abundant sense these
02:50 25 are all Sartans subject to the same sort of recall and we're

02:51

1 prepared to proceed forward and request that the scope of the
2 MDL be enlarged to include them. I think as a practical
3 matter we've got a question of timing and what I mean by that
4 is the JPML is not sitting in June. It is sitting in July in
5 Portland, Oregon. It is not sitting in August. It then sits
6 in September in Los Angeles. We can tee up a petition and
7 there may be a sufficient critical mass to, to move this in
8 July. And I think to the extent that we're doing this, we
9 ought to just do it and get it teed up in July.

02:51

10 THE COURT: Are they necessarily looking at the
11 number of cases?

12 MR. HONIK: Yes. Yes, that is certainly a factor.

02:51

13 THE COURT: Is there another procedure to transfer
14 the cases here from another Federal Court, even if it's not
15 part of the MDL process?

16 MR. HONIK: Yes, there is. And I think that's
17 happened in the case called Langor versus Solko. I think that
18 was transferred to this court on May third under I guess it's
19 1404 is it? Under 1404.

02:52

20 THE COURT: Is that a New Jersey case?

21 MR. HONIK: Yes.

22 THE COURT: But I'm just wondering, if, even if it
23 doesn't come under the JPML if there's a transfer of venue
24 provision, the related cases can be transferred.

02:52

25 MR. HONIK: There absolutely is. That's a very

1 effective way to manage at the very least New Jersey filed
2 cases. We have, and I can hand this up to you. There are,
3 there are three post MDL creation cases on file, two in this
4 District, and one recently filed in Kentucky.

02:52 5 THE COURT: Can I make a suggestion, not only about
6 the two other Sartans, but don't we also have an issue about
7 the chemicals that are at issue? I don't have my notes in
8 front of me, so my letters going to be mixed up. If I
9 remember right, NMBA.

02:53 10 MR. HONIK: NMBA.

11 THE COURT: Okay, That's part of this case
12 unquestionably. There was another one I think NDEA

13 MR. HONIK: NDEA, correct.

02:53 14 THE COURT: Which not explicitly but implicitly was
15 part of this case. One, I wonder if it's better to make --
16 because look at the title of the case. If you look at the
17 opinion, I think it's implicit that NDEA is part of the case.
18 But isn't there a third and perhaps a fourth chemical that
19 might be at issue? And is that something -- because we're not
02:53 20 looking for more work, believe me. But, you know, doesn't it
21 make sense to put all the issues together to, to deal with
22 them all at one time in one case, one discovery? That's why
23 I'm asking these questions.

02:54 24 MR. NIGH: And, your Honor, it is NMBA. That's what
25 you were saying and one is the Losartan has NMBA. That's

1 another -- so the family of nitrosamines, we absolutely
2 believe that all those should be together.

02:54 3 THE COURT: So I was just asking to consider whether
4 those two new chemicals should be part of the MDL in that it
5 should be explicitly clear that NDEA is part although I think
6 it's --

7 MR. HONIK: You've made one lawyer from Minnesota
8 very happy because she argued on the record to the JPML that
9 this should be called some version of nitrosamine litigation
02:54 10 MDL and that was shot down.

11 THE COURT: How come they come they didn't do it?

12 MR. HONIK: They, they didn't have the foresight that
13 Marlene exhibited.

14 MS. GOLDENBERGER: Thank you.

02:54 15 MR. HONIK: But, yes, the suggestion is exceedingly
16 well taken to be sure when we craft our petition, we'll be
17 very mindful to try to capture as much as possible. We only
18 want to go to the well one more time.

02:55 19 THE COURT: Yeah. All we're looking for really for
20 efficiency sake, Judge Kugler and I, it just makes so much
21 sense to have everything related.

22 MR. HONIK: Sure. And I think from the defense
23 standpoint the end game is to try to get global release effect
24 or resolution and I think it behoves them to positively about
02:55 25 sweeping more rather than less in.

1 THE COURT: Okay. Great.

2 MR. HONIK: We'll do that.

3 THE COURT: So I think that takes us through the
4 agenda.

02:55 5 MR. HONIK: It does.

6 THE COURT: I'm going to open up the floor for any
7 other issues. But if, if leadership counsel can ask, if I can
8 ask for their indulgence, you can have this courtroom to meet,
9 no problem. I know I have another hearing at three, but we'll
02:55 10 find another courtroom for you if you need more time. So
11 don't worry about that. But if I could ask the indulgence of
12 leadership counsel, maybe we can talk in the jury room off the
13 record. It won't be long. I would ask that. But are there
14 any other issues we need to deal with today?

02:56 15 MR. GOLDBERG: No, your Honor.

16 THE COURT: Okay. None from the defendants? None
17 from the plaintiffs? We're adjourned and I'll leave it to
18 each side to decide who you want to meet with. But they won't
19 take long.

02:56 20 THE DEPUTY COURT CLERK: All rise.

21 (The matter was then concluded)

22

23

24

25

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